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REPORTS OF CASES
ARGUED AND DETERMINED IN THE
HIGH COURT OF CHANCERY,

DURING THE TIME OF
LORD CHANCELLOR THURLOW,
AND OF
THE SEVERAL LORDS COMMISSIONERS OF THE GREAT SEAL,
AND
LORD CHANCELLOR LOUGHBOROUGH,
FROM 1778 TO 1794.

By WILLIAM BROWN, ESQ.,

OF THE INNER TEMPLE, BARRISTER AT LAW.

FIRST AMERICAN, FROM THE FIFTH LONDON, EDITION;
WITH IMPORTANT CORRECTIONS AND ADDITIONS, FROM THE REGISTRAR'S BOOKS;
FROM THE AUTHOR'S MANUSCRIPT NOTES IN HIS OWN COPY, INTENDED FOR
A FURTHER EDITION; FROM HIS MANUSCRIPT NOTES OF THE
HIGHEST AUTHORITY, BY EMINENT CONTEMPORARY AND
DIGNIFIED MEMBERS OF THE PROFESSION.

TOGETHER WITH ALL THE NOTES AND REFERENCES,

By ROBERT BELT, ESQ.,

OF THE INNER TEMPLE, BARRISTER AT LAW;

AND MANY VALUABLE NOTES

By THE

HON. ROBERT HENLEY EDEN,

OF LINCOLN'S-INN, BARRISTER AT LAW;

TO WHICH ARE NOW ADDED COPIOUS NOTES AND REFERENCES TO AMERICAN AND
LATER ENGLISH CASES.

By J. C. PERKINS, ESQ.

IN FOUR VOLUMES.

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SINCE the publication of the preceding volumes, Sir JOHN SIMEON has favored the Editor with some valuable additional contemporary Manuscript Notes, which he trusts will add to the value of the work. For these, the Editor begs leave, thus, to return his public acknowledgments.

15, New Boswell Court, }
Lincoln's-Inn, 6 June, 1820. }



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Y.

C A S E S
ARGUED AND DETERMINED
IN
THE COURT OF CHANCERY.

SITTINGS BEFORE
MICHAELMAS TERM.

30 Geo. 3. 1789.

EDWARD LORD THURLOW, *Lord High Chancellor*. SIR RICHARD PEPPER ARDEN, *Knight, Master of the Rolls*. SIR ARCHIBALD MACDONALD, *Knight, Attorney-General*. SIR JOHN SCOTT, *Knight, Solicitor-General*.

Ex parte SMITH in the Matter of LEWIS and POTTER.

[Vide Cooke, B. L. 181, &c. (6th ed.)] Lincoln's-Inn-Hall, Nov. 5, 1789.

Where the indorser of a bill of exchange becomes bankrupt, and the holder proves the amount of his bill under his commission, and afterwards compounds it and discharges the acceptor without notice to the assignees of the indorser, he thereby also discharges the indorser's estate, and the proof of his debt must be expunged. (1)

This petition prayed that a debt proved by Sir James Esdaile and Co. under the commission against Lewis and Potter, on certain notes and bills, which had been indorsed by the bankrupt, might be expunged, on account of the holders having, since the proof of the debt, discharged the acceptors of the bills and drawers of the notes, without notice to the indorsers or their assignees. The first note, which was included in the prayer of this petition, was a promissory note made by Barber to Powell, and indorsed by Powell to Lewis and Potter, who, having *occasion [*2] to discount it, indorsed it to Esdaile and Co. Lewis and Potter became bankrupts before the note became due. The note not being honored when it fell due, Sir James Esdaile and Co. proved the amount in June, 1788, under the commission against Lewis and Potter; after which they proceeded at law against Barber and Powell, to judgment; and, then, there having been a proposition on the part of Barber to pay 15s. in the pound to all his creditors, in full discharge of their debts,

(1) In these mercantile securities, the parties are liable as principals and sureties in the order that they stand; and, of course, the rule prevailing, that a discharge or time given to any surety shall be a discharge of the principal, is peculiarly applicable to such instruments. See Bailey on Bills of Exchange, 152, and the notes (ed. 1813). Chitty on ditto, 299, &c., who refers to most of the material authorities; amongst which, vide *Ex parte Gifford*, 6 Ves. 805, 807, &c. Vide *ibid. etiam*, 734; and see *Nisbet v. Smith*, *ante*, 2 vol. 579, and the Editor's notes; and Cooke's B. L. 181, &c. (6th ed.)

Esdaile and Co. accepted the same, and gave a full discharge to Barber for the amount of this note, without the consent or privity of the assignees of Lewis and Potter.

Against the petition, it was said, that the rule, which prevailed where the drawer or indorsers were solvent, could not prevail where the indorser was a bankrupt; the meaning of that rule, which requires immediate notice to be given to the drawer, was, that the drawer, upon taking up the bill, might recover from the acceptor the amount of those effects, supposed to be in his hands, in respect of which the bill was drawn; and so in the case of a promissory note, where the drawer did not pay at the time, notice was required to be given to the indorser, in order that he may take it up and recover over against the drawer; and the consequence is, that if the holder of the note or bill, instead of giving notice to the drawer or indorser, will compound with the acceptor of the bill, or maker of the note, and discharge him in respect thereof, he precludes the drawer or indorser of this advantage; and, therefore, shall not afterwards call upon them for payment. But where the indorser is a bankrupt, as in the present case, such notice cannot be necessary; nor can it be necessary to have the consent of the assignees to accept a composition, when it appears to be a *bonâ fide* transaction; for the indorser being bankrupt, it is impossible he should take up the note himself, which is the only reason of the notice being necessary. It would be a very unreasonable rule, which required the holder of a bill or a note to accept, at his peril, a fair composition from the acceptor, which was the best that his circumstances would allow, and which was made upon a full investigation of his affairs, that, if any fraud appeared in the particular transaction, and that, in fact, the composition taken was not the best bargain that the holder could make, this would be an answer in the particular case; but that the general rule, as between solvent persons, ought not to apply generally, where the party to whom notice was expected to be given, was bankrupt.

[*3] *LORD CHANCELLOR. I have before decided, that the doctrine of notice, which holds amongst solvent persons, does not apply as between bankrupt estates; but here, the indorser only was bankrupt, the maker and the payer of the note were not. The debt, proved by Sir James Esdaile, was undoubtedly well proved at the time, and the question is, whether the subsequent conduct of the creditor has destroyed that interest which he acquired by such proof. By the composition which he has made with the drawer of the note, which goes to the length of discharging of the drawer, he certainly has prevented the assignee of the indorser from coming on the drawer of the note for payment of what his estate shall pay in consequence of the proof; and yet, on the other hand, it does seem a strong thing to say, that where there are many names on a bill, one of whom is insolvent, though not bankrupt, and the other bankrupt, and the holder proves under all the commissions, and then makes a composition, *bonâ fide*, with the insolvent person, and obtains from him all that he possibly can, that he shall, thereby, be deprived of the benefit of all the provision made by him under the commissions against the other parties, who stood on the bill posterior to the party compounded with. And I am well satisfied, in this case, Sir James Esdaile did, in fact, make the best terms he could with the drawer of the note, by taking 15s. in the pound of him in full. And whatever difficulty I may find in making a precedent which allowed of such a composition, without giving notice to the assignees of the indorser, I am convinced that the justice of this particular case, if it stood alone, would not require me to expunge this debt. The

case made does not impute any fraud to the transaction of this composition; but, on the contrary, the holders used all their diligence at law against the drawer of the note and the payer, and then made the best terms they could with the acceptor: though, at the same time, they have gone to the extent of acquitting him altogether in respect of the note. However, whatever may be the circumstances of the present case, I think in point of precedent it may be dangerous to say, that, after such an acquittal, the holder may resort to the indorser's estate. It is certainly open to this sort of fraud, that when the holder sees that, in one way or other, he is sure of his 20s. in the pound, he may favor an acceptor, at the expense of an indorser, by compounding with the acceptor for just so much as he conceives will be the deficiency under the indorser's commission. In *this view, it [*4] may be a dangerous precedent: and I cure this danger by saying, generally, that the holder of paper shall not compound with the prior names on the bill, but with the consent of the assignees of the posterior party. And it is not an answer to say, that if any fraud is practised in the composition, that shall take it out of the general rule. It is much better, and more convenient in practice, to have a precise rule to go by; and justice will, in general, be better done to all parties. It is not that notice is strictly necessary; but I go upon this, the debt is well proved against the indorser's estate; this gives his assignees a right of action against the acceptor, or drawer, for the amount paid out of the indorser's estate: but this right is cut away by the composition and discharge given to the acceptor by the holder. Therefore it is better to say, let the assignees either take the whole, or permit the holder to make the most of it he can against the acceptor. I think, therefore, the debt must be expunged.

▲ few days afterwards this case was mentioned again; when his Lordship said, he had considered it a good deal, and had conversed on the subject with some of the judges, and he was satisfied that the holder must get the consent of the assignees of the indorser (2) before they can discharge the acceptor without discharging the indorser's estate at the same time. (3) (a)

(2) Lord Redesdale's MS. notes observe here, that it seems such consent cannot be given without the previous concurrence of the creditors at a general meeting, under the stat. 5 Geo. 2.

(3) Vide also *Ex parte Smith*, S. P. in the same bankruptcy, stated Co. B. L. 183 (6th ed.) and note (1) *antea*.

(a) Bayley on Bills (Am. ed. 1836), 357, et seq. and notes; Story on Bills, ch. 12, § 429; *Lynch v. Reynolds*, 16 John. 41; *Lewis v. Jones*, 4 Barn. & C. 506; *English v. Darley*, 2 Bos. & Pull. 61; 3 Kent (5th ed.), 112, 113; *Clarke v. Devlin*, 3 Bos. & Pull. 263. As to the doctrine of discharging surety by giving time to the principal, see *Nisbet v. Smith*, 2 Bro. C. C. 579, and notes to that case.

[*5]

*MICHAELMAS TERM.

30 Geo. 3. 1789.

MOLESWORTH v. MOLESWORTH.

[S. C. Reversed on rehearing, post, 4 vol. 408.]

Legacy to a female infant, with power to trustees, in case of misbehavior, or marriage without consent, to diminish it; and which legacy was [supposed to be (1)] comprised in a miscalculation of the number of legacies which were given over to the wife in case of the legatee's dying before becoming entitled, lapsed by the death of the legatee; though by the words of the gift it would have been vested. (1)

THE Honorable Coote Molesworth made his will, dated 1st October, 1782, and, thereby, gave to Richard Molesworth and Nathaniel Nicholls, their heirs, executors, administrators, and assigns, all his messuages, lands, tenements, and hereditaments, goods, plate, mortgages, &c. real and personal, upon trust to raise and pay such sums of money as they, from time to time, should think proper, for the comfortable support and maintenance of his dearly beloved wife, for and during the term of her natural life; and from and after the decease of his said wife, then upon the further trust that his trustees should apply the full sum of 3000*l.* sterling to and for the sole and separate use of his grand-niece, Henrietta Maria Molesworth, subject, nevertheless, to the control and discretion of his trustees thereby invested in them; that is to say, that if the said Henrietta Maria Molesworth should hereafter, in any flagrant instances, misbehave herself, or should marry against, or without the advice and consent of his said trustees, or the survivor of them, then he did authorize and empower his said trustees, to withhold or deduct from the said sum of 3000*l.*, as his said trustees should, in their judgment, think proper, according to the nature and degree of said misbehavior; and he did, thereby, direct that his said trustees should receive, employ, and apply to the best seeming advantage, all such sum or sums of money as should be so withheld and deducted for the sole use, benefit, and behoof of his said wife, with full liberty to dispose of the same, either during her life or by will. He then gave, after the decease of his wife, several pecuniary legacies, (twenty-four in number, other than that one legacy of 100*l.* was given, "to the now four children of Archibald and Mary Grant, to be equally divided, share and share alike, wishing that each of them may have the liberty of managing his and her respective share, as he [*6] or *she may choose.") The testator then provided that, "if his estate and effects, after the decease of his said wife, and after payment of the said legacy, or sum of 3000*l.*, should fall short of paying the legacies before given, that the said several legacies (except the said Henrietta Maria Molesworth's) should abate in proportion to the several legacies given to them respectively," and proceeded thus: "of the legatees mentioned, twenty-four in number, it is at least possible that one or more may die before he, she, or they, become entitled to his, her, or their legacy or legacies; and, in that case, his will was, that the sum or sums so given, should revert and return to the sole use, benefit, and behoof of his said wife."

(1) This decree was reversed by Lord Loughborough C. upon a rehearing; who observed it was impossible to include the legacy in question amongst the number given over to the wife in the event of lapse. Vide S. C. postea, 4 vol. 408, and cases cited.

The will appointed no executors; but, by a codicil, Molesworth and Nicholls were appointed executors.

The testator died in December, 1782: Henrietta Maria Molesworth survived the testator, and died in December, 1784, aged twenty-three years, unmarried and intestate; and the plaintiff, her father, obtained letters of administration to her. Maria Molesworth, the testator's widow, died in November, 1785, and by her will made two of the defendants, who were appointed executors by the codicil to Coote Molesworth, executors of her will.

The plaintiff, as administrator of his late daughter, applied, after the death of the widow, to the defendants for payment of the 3000*l.*, the legacy given to her by the will; and they refusing to pay the same, he filed the present bill, praying (*inter alia*) that it might be declared that the legacy vested in Henrietta Maria Molesworth, and that the same might be paid to him.

Mr. *Solicitor-General*, Mr. *Lloyd*, and Mr. *Alexander*, for the plaintiff.

The only question is, whether the legacy was vested, or whether it was so affected by anything as to make it not payable, on account of the death of the legatee in the lifetime of the wife.

It comes within those cases that have been decided on the ground that the legacy was vested, though the payment of it was postponed on account of the circumstances of the estate. *Dawson v. Killet* (ante, vol. i. p. 119): *Monkhouse v. Holme* (ibid. p. 298), and a variety of other cases, show that legacies so circumstanced are vested.

*The authority of the cases to the contrary, in the Exchequer, of [*7] *Norris v. Huthwaite* (cit. ante, vol. i. p. 299), and *Smith v. Salmon* (cit. ibid.), which alone occasioned any doubt upon the subject, have been overruled by Lord Kenyon, in *Benyon v. Maddison* (ante, vol. ii. p. 75), and by the barons of the Exchequer, in the case of *Hamilton v. Sneyd*, in June, 1787, where 200*l.* were given to Hampton, a trustee, to the use of one for life, and after her decease to Ann Sneyd; if she married to be paid to her, but if she died unmarried, then to be divided between Edward Sneyd and William Sneyd: Ann Sneyd died unmarried, and one of the brothers also died; but his share was held to have vested. In this case, if the will had stopped without the particular clauses, there is no doubt the legacy would have been a vested legacy. Then, with respect to the powers reposed in the trustees, it is a condition subsequent, which will not prevent the legacy from vesting. If a legacy be given to an infant with interest, and to go over if the infant does not attain a particular period, that does not prevent the legacy vesting; and, upon a condition subsequent, it is perfectly clear, that if it never happens, it is the same as if it never was in the will: if it becomes impossible by the act of God, the legacy is absolute; here she has not misbehaved, but has died. In *Peyton and Bury*, 2 Williams, 526, the condition having become impossible, by the death of one of the trustees, the legacy was held to be vested. Then the only remaining question is with respect to the lapsing of the twenty-four legacies, in case of the death of the legatees in the lifetime of the wife: but this is a totally separate legacy; those are legacies of particular sums as pecuniary legacies; and, counting the 100*l.* to the now four children of Archibald and Mary Grant as one legacy, as we contend it ought to be counted, there are just twenty-four legacies exclusive of this sum given to the trustees for the benefit of Miss Molesworth.

But Lord CHANCELLOR, thinking these four separate legacies of

aliquot parts of the 100*l.* to each child, and that the testator had only misreckoned the number of his legatees, and meant Miss Molesworth's legacy to be no more vested during the life of the wife than the others (although he allowed that, had it not been for the superadded words, it would, by the prior gift, have been a vested legacy), held that it lapsed by her death in the lifetime of the wife, and dismissed the bill. (2)

(2) Reversed on rehearing before Lord Loughborough C. *postea*, 4 vol. 408, which see.

[*8] *FETTIPLACE v. GORGES. [S. C. 1 Vesey, jun. 46.]

(Reg. Lib. 1789. A. fol. 2.)

Where personal property is given to a feme covert, to her sole and separate use, [it is subject to all the incidents of property vested in persons *sui juris*, and] she may dispose of it by will without the assent of her husband. (1)

THE plaintiff, having been, some years since, married to his late wife, by indenture, 2d and 3d August, 1772, conveyed real estates to Lord Viscount Howe and his heirs, to the use and intent that the said Lord Howe and his heirs, during the life of the plaintiff, should receive an annuity of 400*l.* upon trust, to pay one moiety thereof to the plaintiff, and should stand possessed of the other moiety thereof in trust, for the sole and separate use and benefit of Sophia Charlotte Fettiplace, the plaintiff's wife, during their joint lives, and so as not to be subject to the debts, engagements, or control of her said husband; and, to that end, that the said Lord Howe should either pay the same to her, or to such person or persons, and for such uses and purposes as she, from time to time, (1) notwithstanding her coverture, should, by writing under her hand, direct and appoint; and should permit and suffer, or authorize her and her assigns to receive and take the same, as she or they should think fit; and that her receipt or orders in writing should, notwithstanding her coverture, be a sufficient discharge.

The Honorable Juliana Page, widow, by her will dated 1st December, 1776, gave and bequeathed certain legacies to her niece, the said Sophia Charlotte Fettiplace, plaintiff's late wife, in the words following: "I leave, in trust to Lord Howe, for the sole and separate use of my niece Charlotte Fettiplace, one thousand pounds stock, and what furniture is mine at Sir Gregory Turner's house in Spring-gardens, an account of

(1) Lord Eldon C. observed upon this case, that Lord Thurlow held the expressions here used "from time to time," &c., to be equivalent to those inserted by his Lordship's protective care, in the settlement of Miss Watson, which were manifestly intended to restrain anticipation; and yet, nevertheless, that, in each case, the whole subject matter being vested in the wife, the incidents of disposition, either by will or by deed, were unavoidable; see in *Roach v. Haynes*, 8 Ves. 589, and in 11 Ves. 221, 222. It is certainly true, that courts of equity have "struggled hard" to protect the separate property of a feme covert against her own acts, with reference to it, whether implied (see the notes to *Hulme v. Tenant*, ante, 1 vol. 16), or express, but they felt their power inadequate to the effect; and the "attempt was overruled in *Pybus v. Smith* (*postea*, 340, and 1 Ves. jun. 189); which Lord Thurlow determined with great reluctance." Vide per Lord Eldon C. 11 Ves. 222; and in *Jackson v. Hobhouse*, 2 Merivale, 487. The case of *Jackson v. Hobhouse*, 2 Meriv. 483, 488, shows there may be cases where words restrictive of anticipation will be available; but the decisions of Lord Loughborough C., in *Whistler v. Newman*, 4 Ves. 129, and *Mores v. Huish*, 5 Ves. 692, seem now wholly untenable. Vide (inter alia) per Lord Eldon C., in *Sperling v. Rochfort*, 8 Ves. 177, 178, and *Parkes v. White*, 11 Ves. 223, &c. See also 1 *Phillimore's Rep.* 352.

which is here inclosed ;" and appointed Lord Howe executor and residuary legatee. Lord Howe proved the will ; and 1000*l.* 3 per cent. reduced Bank annuities were set apart to answer the legacy to plaintiff's said late wife, in the name of Lord Howe, as a trustee for her. Also, after making the said indenture, several sums of money and other property and effects were, from time to time, given to, and saved by, the said Sophia Charlotte Fettiplace, and were laid out in the purchase of 1900*l.* 3 per cent. consol. annuities, in the name of the Honorable Caroline Howe, widow, as a trustee for the said Sophia Charlotte Fettiplace.

Sophia Charlotte Fettiplace died in May, 1787, leaving her husband surviving her, but having first made a will, or testamentary *writing, bearing date 1st July, 1782, as follows : " I, Sophia Char- [*9] lotte Fettiplace, do leave all my personal estate, and everything belonging to me, to my niece Diana Frances Gorges, of .
Witness my hand, Sophia Charlotte Fettiplace." And the defendant Diana Frances Georges obtained administration, with the will annexed, to the said Sophia Charlotte Fettiplace.

The plaintiff filed the present bill, insisting that his late wife had no power to make such will, he never having assented to the same, or to her having such separate property ; and, therefore, praying a transfer of the stock to himself.

Mr. *Mansfield*, and Mr. *Graham*, for the plaintiff. There is nothing in this case to authorize Mrs. Fettiplace to make a will ; therefore the plaintiff is entitled, as a common law right, to all the property his wife left behind her. If there be anything to entitle her to make a will, it must be the deed ; but this was no contract before marriage, or in consideration of any fortune brought by her, and they never had been separated before the deed, were merely so in consequence of his distresses. There is not a word in the deed that implies any engagement, on the part of Mr. Fettiplace, that she shall have a power of disposal of what she may acquire ; and it does not at all follow from such an appropriation of his property. There are *dicta* with respect to savings from pin-money, or other separate property, that the wife shall be at liberty to dispose of them, and even that she shall be preferred against the heir ; but not where it is a mere provision made as this is. Then 1000*l.* is given to her for her sole and separate use ; but from such a gift, without the assent of the husband, no power of disposal can arise. If a power of disposal makes part of the gift, and the husband suffers her to take the property, he will be bound ; but it does not follow, from the gift being to the sole and separate use, that he shall be deprived of anything she might leave behind her. Its being to her sole and separate use is so strictly confined to being so during the coverture only, that being so left during the time of a former husband, does not prevent the disposing power of a second. *Tudor v. Samyne*, 2 Vern. 270, and Sir *Edward Turner's* case, there cited. With respect to real estates, it has been held, that the act of the husband (consenting to her having a power of disposal) will

*not bind the heir, who cannot be bound but by a fine. *Peacock* [*10] *v. Monk*, 2 Vesey, 190. If the Court has held that the heir shall not be bound by the act of the husband, there is no reason the husband himself should be bound by the act of a stranger. Then, is there anything in the gift that, necessarily, implies a power of disposal ? With respect to the construction of powers, it is the same with respect to a legal estate, and an use. If an ejectment was brought, by the heir-at-law of the wife, against her devisee, of land so given, it would sound very

harshly, in a court of law, that he should be bound by such a power. Then, the Court will lean as much in favor of the rights of the husband, as of those of the heir-at-law. If the question was whether, by such a gift to the sole and separate use, a power of devising was given, the Court must, reluctantly, declare it was bound to give that construction; the words do not, naturally, give a power to dispose.

LORD CHANCELLOR. The case of *Peacock v. Monk* supposes that there may be such an agreement as will bind the heir; although, where the wife makes a voluntary disposition against the heir, it cannot be carried into execution: but, with respect to personal property, her disposition is good. (a)

Mr. *Solicitor* mentioned the case of *Wright v. Lord Cadogan* (6 Brown. Parl. Cases, 156), where it was held, that, though the will of land was not good at law, yet it was a good will in equity; and *Hearle v. Greenbank*, 1 Vesey, 298, that where personal property was so given to a wife, she is considered, as to it, as a feme sole.

LORD CHANCELLOR. In that case, if the wife makes no disposition, the husband takes it as next of kin, (2) not from his marital rights. (2) All the cases show that the personal property, where it can be enjoyed separately, must be so with all its incidents, and the *jus disponendi* is one of them. (b)

Bill dismissed; costs (by consent) out of the property.

(2) This seems an inaccurate expression. Subsequent judges have observed, that the husband is in no respect "next of kin" to his wife, nor she to him: upon her death, he is entitled to her property, rights, and credits, *jure mariti*, taking out letters of administration to her, and that this right is not given by the statutes, though acknowledged by them. See per Lord C., in *Watt v. Watt*, 3 Ves. 246, 247, and *Garrick v. Lord Camden*, per Lord Eldon C. 14 Ves. 372, 381, 382. { 4 Kent (5th ed.), 136; *Jenkins v. Freyer*, 4 Paige, 47; *M'Kay v. Allen*, 6 Yerger, 44; *Stewart v. Stewart*, 7 John. Ch. 229; *Hunter v. Hallet*, 1 Edw. 388. But see *Byrne v. Stewart*, 3 Desaus. 148; *Elms v. Hughes*, ib. 161. }

(a) See *Hodgden v. Lloyd*, 2 Bro. C. C. 534, 544.

(b) *Clancy, Rights of Women*, ch. 7 (Am. ed.), p. 308, et seq. 321; *Sagden on Powers* (4th Eng. ed.), 115, 116; 2 Kent (5th ed.), 170-172; 2 Story, Eq. Jur. ch. 37, § 1390, note, § 1392, note; *Long v. White*, 6 J. J. Marsh. 230; *Keene v. Johnston*, 1 Jones & C. 255; *Hulme v. Tenant*, 1 Bro. C. C. 16, 17, 19, 20, 21, and notes and cases cited in reference to the power of the wife over her separate property. See *Socket v. Wray*, 4 Bro. C. C. 483.

[*11]

*BANCROFT v. WENTWORTH.

(No Entry.)

Plea of the stock-jobbing act, (1) to a bill for discovery of stock transactions, overruled, [as the 2d section of the act requires parties to make a discovery, whereon to found an action.] (2)

[In Chancery. Lincoln's-Inn-Hall, 21st April, 1803. Under the act against stock-jobbing, the "six months," in the 1st section, means lunar months, and no discovery lies where the cause of action arose prior to the expiration of six lunar months. Pleading. Use of the charging part of bills. *Windale v. Fall*, in note.]

THE plaintiff filed his bill against the defendant, charging that the defendant had received several sums of money, enumerating them, to the

(1) 7 Geo. 2, c. 8, commonly called Sir John Barnard's act.

(2) It is very observable, that the generality of this position has been since confined by Lord Eldon C. to cases merely within the first section of the act; and that defendants are at liberty to avoid discovery, in cases within the 5th and 8th sections. *Bullock v. Richardson*, 11 Ves. 373. Vide also *Beames's Elem. Pleas*, 261, and note. It is further to be noticed,

amount of 5000*l.* and upwards, from different persons, for his the plaintiff's use, for which the plaintiff had no voucher; and that the defendant refused to come to an account, but pretended that the plaintiff was indebted to him in a sum of 2000*l.* and upwards, for a stock loss, in consequence of purchases and sales of stock made by order of plaintiff; charging, on the contrary, that he had never given the defendant any directions to purchase or to sell stock; praying an account, and that defendant do pay to plaintiff what shall appear to be due to him.

To this, the defendant pleaded, in bar, the act of the 7th Geo. 2, (1) against stock-jobbing, by which it is enacted, that all contracts made for transferring stock, whereof the persons contracting are not possessed, shall be void, and the persons making such contract shall forfeit 500*l.*, and that, by a discovery, he might make himself liable to the penalty in the act.

The plea being set down to be argued, was overruled, on the 2d section of the act, by which the party is bound to answer any bill that may be filed in a court of equity. (2) (3)

that Lord Eldon C. determined that the expression of six months, in the 1st section, means lunar months only; and that (in consequence) no discovery can be compelled where the cause of action appears to have been prior to the expiration of six lunar months. *Windale v. Fall*, on Demurrer, 21st April, 1803. Editor's MSS. The Editor perceiving the case to be wholly unreported, and thinking the doctrine it contains very valuable, subjoins (after note 3) a correct copy of his own note, taken in Court at the time.

(1) See note (1) in the preceding page.

(2) See note (2) in the preceding page.

(3) Lord Redesdale's notes question whether an indictment would not lie; and refer to Mr. J. Ashhurst's judgment, in *Rex v. Sainsbury*, 4 T. R. 462.

WINDALE v. FALL, on Demurrer.

Bill of discovery in aid of an action at law, under the 1st section of Sir John Barnard's act against stock-jobbing; 7 Geo. 2, c. 8. Alleged that on the 20th July,* 1802, defendant entered into various contracts, &c. with plaintiff, who acted therein as a broker for deliveries, putts, and refusals, of stock, &c. &c. contrary to that act, and that on the 22d of same July,* plaintiff paid the sum of 300*l.* in respect thereof, on account of his principal.

The bill then stated that plaintiff brought his action for the recovery of "the sum aforesaid," upon the 19th of January, 1803.

The bill then, after various statements, as to the other contracts, &c. (without specifying any further payments) charged in these words, that "all the said payments were made within six months of the action commenced," and to this bill there was a general demurrer.

Mr. Romilly, and Mr. Hall, for the demurrer. Mr. Hart, in support of the bill.

Lord Chancellor. — "It is in this suit unnecessary to say more upon the fact of one of the parties being a broker; and upon the question of, whether, in such a case as this, they are within the act, than that brokers are, under this act in general, more responsible than others."

Here, the plaintiff comes into equity for a discovery by virtue of the special provisions of the act in question. Therefore is it, that his statement must be consistent with what is required by the act; and to entitle him to the benefit of that point which relates to the discovery [sect. 2], he must show himself entitled to bring his action as therein prescribed.

His Lordship then stated the 1st section of the act, relying upon "the premiums, sums of money, &c., being directed to be restored and repaid to the person who gave or paid the same," and the words immediately following, "who shall be at liberty within six months to bring his action" (namely, such action as therein specially directed).

Such therefore being the mode prescribed, the first question is, whether the plaintiff, here stating a transaction as a substantive cause of such an action, and stating an action actually commenced by him, has by his own showing made it appear to have been brought within six months. He states, the sum of 300*l.* was paid by him on the 22d July, 1802, and that he commenced his action on the 19th January, 1803. It is true, he has brought it within six calendar months, but not within six lunar months. The act has nothing added to the word six months, wherefore it must (as has been settled) (1) be construed to relate to lunar months. Upon this principle, then, the action must fail as to the 300*l.* Now supposing for the present [as in fact it is], this to be the whole of the plaintiff's case, I am quite clear he is not entitled to any discovery under the act, if he, as to this, states himself out of Court as to his right of action.

(1) *Vide postea.*

* Note the several dates.

By section the 2d, "Persons who by virtue of the act may be liable to be sued for the moneys, premiums, &c. shall be compellable to answer a bill in equity for a discovery." And there is in the 3d section a protestation against the penalties, in favor of the party that answers such a bill. Now the words in the 2d section, "as aforesaid," connected with and immediately following the words "to be sued for," have an inseparable relation to the very mode prescribed by the act, and no other: and, as the act imposes the duty, the plaintiff must show that he has proceeded regularly, which (as is before observed) he has not, in respect of the substantive payment of 300*l*. Then the question is, whether there is any other statement, from whence it can be clearly collected there was any other actual payment made. There is, however, not a syllable in the statement of the bill as to any other actual payment: the whole of the rest of it mentioning contracts, &c. &c. But then it is said, that the deficiency is saved by the charging part, viz. that "all the said payments were made within six months." Now it is clear, that whatever may be the nature and effect of the charging part of bills (2) the words here, "All the said payments," can only relate to payments specifically mentioned; and it is as clear from this bill, that no other payment was specifically mentioned than the above sum of 300*l*. Wherefore I am clearly of opinion, that the demurrer must be allowed.

The Lord Chancellor then enlarged upon the question of lunar and calendar months, and mentioned the case of the Southern Whale Fishery, in B. R., which was argued and determined when he was Attorney-General. And he (the Lord Chancellor) then argued that it was obvious, from every clause of the act, that the legislature intended calendar and not lunar months.

But Lord Kenyon, C. J., said, that the legislature's intention could not be argued upon, if they had not made use of expressions sufficient in law. That it would have been very easy to have specifically mentioned calendar months if it were necessary, but that, where the word "months" was used singly, without more, the law always intended thereby lunar months. (3) (a) "Whereby my objections were effectually overruled." The consequence of which is, that the case in question falls under the same principle.

Note. In the course of the judgment, the Lord Chancellor entered somewhat into the nature of the charging part of bills: viz. That originally a bill used to consist only of a statement and a prayer; or if anything in the nature of a charge was added, it was merely a repetition to enforce the truth of the statement.

Lord Eldon then proceeded thus: "With deference to Lord Thurlow, I do not agree with his observation upon its being so very easy to frame bills; and I know it has been the course of all able draftsmen to apply the charging part to a variety of additional purposes to what could have been done by a mere statement. (4) In my practice I have frequently thought upon the subject; and it seemed to me that one of the uses of a charge was to supply the necessity of an amendment, in case of the defendant's using a defence, which the draftsman anticipates as certain, and answers effectually. The proper mode I think an ingenious draftsman will take, is to consider what kind of defence may, or is likely, to be made at the hearing; and, thus entering into the spirit of the argumentation on the other side, to answer them effectually by charge, if he can. Such a charge therefore, either prevents the setting up of a probable defence, or if it is set up, is intended to overthrow it. And the practice of using this mode continues in almost every bill that is filed. Mr. Lloyd, however, was against this mode and used to say (and I believe is still of opinion), "that a bill ought to be as short as possible; and in particular, that it ought not by any means to suggest a defence to the opponent." (5) < As to the charging part of the bill, and the use of it, see Story, Eq. Pl. ch. 2, § 31, 32, and the notes; Stafford v. Brown, 4 Paige, 89; Brinkerhoff v. Brown, 6 John, Ch. 151; Aikin v. Ballard, Rice's Eq. 13; Parham v. Randolph, 4 How. 436.

Per Lord Eldon C. from the Editor's MS. note, taken in Court.

(2) See per Lord Eldon C. postea.

(3) See acc. 6 Co. 61. But to this general rule there are exceptions; and in bills of exchange, and promissory notes, and in cases of lapse and *quare impedit*, the term months means calendar months. < Story on Bills, § 143, 330; Bayley on Bills (Am. ed. 1836), p. 238; Chitty, Cont. (6th Am. ed.) 730 a. >

(4) See Mitford's T. 42, 47.

(5) Lord Kenyon, when a pleader, never inserted the charging part. 11 Ves. 574, 575.

(a) See Chitty, Cont. (6th Am. ed.) 730 a, and cases cited in note (u); 4 Kent (5th ed.), 95 note (b); Stackhouse v. Halsey, 3 John, Ch. 74; Creswell v. Harris, 2 Sim & Stu. 476. In America, the old English rule is considerably impaired, and the term month usually computed, and especially in statutes and judicial proceedings, as calendar. Commonwealth v. Chambre, 4 Dall. 142; Alston v. Alston, 2 Const. S. C. R. 604; 4 Kent (5th ed.), 95 note (b); Story on Bills, § 330, note 3. See Hunt v. Holden, 2 Mass. 170; Avery v. Pixley, 4 Mass. 460; Hardin v. Major, 4 Bibb. 108.

SEDGWICK v. WATKINS. [S. C. 1 Ves. jun. 49.]

(No Entry.)

Wife's affidavit, [to ground a writ of *ne exeat regno*] against her husband, cannot be received. (1)

BILL filed by infants against the administratrix of an intestate's estate, who had married again, and her second husband, for distributive shares. An application had been made for a writ of *ne exeat* against the husband of the administratrix, on the affidavit of the wife that he had possessed the personal estate of the intestate, and was going abroad.

Lord CHANCELLOR was of opinion, that he could not receive the affidavit of the wife against her husband, especially as she was a co-defendant.

*A new bill was then filed, and the wife made co-plaintiff with [*12] the infants; and, on a similar affidavit of the wife, a similar application was made.

But, Lord CHANCELLOR said he continued of opinion, that the evidence of the wife could not be received against the husband in a case of this kind: (2) that the only instance of the kind found in the books was a case in which Sergeant Puckering† had granted a writ on such an affidavit; but, on Lord Ellesmere's coming to the Great Seal, shortly afterwards, a similar application was made to him, on the authority of that case, which he refused. (a)

† Possibly his Lordship alluded to the case of *Lake v. Dean*, Toth. 158. Sir John Puckering was Keeper of the Great Seal from 28th May, 1592, till 6th May, 1596, when the Great Seal was delivered to Sir Thomas Egerton, afterwards Lord Ellesmere: the case in which he refused the application was, probably, *Holman v. Audley*, Toth. 160. (3)

(1) See also *Percy v. Powel* (from Mr. Bell's MS. note), *Beames's Ne Exeat Regno*, 25, 28, and 29, in note, and *Collinson v. Main*, 18 Ves. 353.

(2) It seems that Lord Thurlow's observation, in the contemporary report, in 1 Ves. 49, that the only instance in which a wife's affidavit can be used against her husband, is to obtain security for the peace, is incorrect. See per Lord Eldon C. in *De Manneville's case*, 10 Ves. 55.

(3) Vide *Beames's Ne Ex.* 29, note.

(a) See 1 Smith, Ch. Pr. (Am. ed.), 580-582; 2 Madd. Ch. Pr. (4th Am. ed.) 231.

DELANCY v. WALLIS.

Affidavit to the equity of an injunction-bill, where the plaintiff at law is abroad, must accompany the motion for the subpoena. (1)

WHERE the plaintiff at law is abroad, and an injunction-bill filed, and motion that service of the subpoena upon the attorney at law shall be good service, an affidavit of the truth of the equity of the bill must accompany the motion for the subpoena, in conformity to the practice in the Court of Exchequer. (a)

(1) The practice in the Court of Chancery, which seems about this period to have been very fluctuating, seems now long since to have been settled agreeably to this decision. Vide *Stephens v. Cini*, 4 Ves. 359; 13 Ves. 593, note; *Kenworthy v. Accunor*, 3 Madd. Rep. 551; and the Editor's note to *Revet v. Braham*, ante, 2 vol. 640. The course taken, therefore, in *Burke v. Vickars*, postea, 24, seems quite contrary to the prevailing authorities.

(a) See *Burke v. Vickars*, post, 24 and note; 1 Smith, Ch. Pr. (Am. ed.) 605, 606; 2 Madd. Ch. Pr. (4th Am. ed.) 198.

COLMAN v. SAREL.

SAREL v. COLMAN.

[S. C. 1 Ves. jun. 50, *quod vide.*]

(Reg. Lib. 1789. A. fol. 25.)

A court of equity will not carry into execution a voluntary deed, without either a valuable or meritorious consideration. (1)

GEORGE DAVY, of Tiverton, in the county of Devon, attorney at law, by indenture, dated 11th June, 1767, made between himself of the first part, and Sarah Oliver and Joan Dunsford of the other part, in order to make Joan, the wife of John Sarel, some satisfaction for the injury and abuse which she had, most wrongfully and maliciously, received from Alice, the wife of said Geo. Davy, and to make some provision for said Joan Sarel's better support and future livelihood, and in consideration of 5s. granted, bargained, and sold to the trustees, stock to the [*13] amount of 1000*l.* *in three per cent. bank annuities, with the interest and dividends to grow due for the same, arising on the death of the said George Davy, to hold the same in trust, in case Joan Sarel should outlive him, to permit her to receive the dividends during her life, for her own use, with power to dispose of the said 1000*l.* at her death, by deed or will, to such child or children of hers as were then living, or should be living at the time of her death, in such shares and proportions as she should think fit; and in case the said Joan Sarel should die in the lifetime of George Davy, he covenanted that he would, for so long as he should live, pay the interest of the said stocks to the trustees, for the benefit of Joan Sarel's then present children, according to such shares as she should give the said capital stock. The said indenture contained a proviso, by which the grantee, Joan Sarel, was not to reside out of Tiverton, where Geo. Davy the grantor resided.

Joan Sarel died, 16th January, 1779, having first made her will 29th December, 1775, by which she gave the said 1000*l.* stock to be divided among three of her children (the plaintiffs in the cross-bill), to wit, 200*l.* thereof to plaintiff Robert Sarel, 600*l.* to plaintiff Samuel Sarel, and 200*l.* to plaintiff Jenny Sarel.

Geo. Davy, died 15th December, 1784, having made his will, and appointed Colman and others (plaintiffs in the original bill) his executors.

(1) See this case in 1 Ves. jun. 50-56, where it is much better reported; and where the subsequent proceedings are stated as to the doctrine, and the case itself, see per Lord Eldon C. in *Ellison v. Ellison*, 6 Ves. 662. His Lordship there says, "I take the distinction to be, that if you want the assistance of the Court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*, as upon a covenant to transfer stock, &c.; if it rests in covenant, and is purely voluntary, this Court will not execute that voluntary covenant; but if the party has completely transferred stock, &c., though it is voluntary, yet, the legal conveyance being effectually made, the equitable interest will be enforced by this Court. That distinction was clearly taken in *Colman v. Sarel*, independent of the vicious consideration. I stated the objection, that the deed was voluntary; and the Lord Chancellor went with me so far as to consider it a good objection to executing what remained in covenant. But, if the actual transfer is made, that constitutes the relation between trustee and *cestui que trust*, though voluntary, and without good or meritorious consideration; and it is clear, in that case, that if the stock had been actually transferred (unless the transaction were affected by the turpitude of the consideration), the Court would have executed it against the trustee and the author of the trust." See also further per Lord Eldon C. in *Antrobus v. Smith*, 12 Ves. 46, and in *Pulvertoft v. Same*, 18 Ves. 99.

No transfer of the stock was made by Geo. Davy, to the trustees in his lifetime.

Two bills were filed, the first by Colman and others, executors of Geo. Davy, to set aside the deed, as obtained by menaces, and *pro turpi causa*. The second by the children of Joan Sarel, for a transfer, and for the intermediate dividends between the death of Joan Sarel and that of Geo. Davy, in the proportions given by their mother's will.

No evidence being given of any violent means used by Joan Sarel for obtaining the deed, nor any ill usage of her, by the grantor, till after the deed, nor any proof of a *turpis causa*, but the deduction to be drawn from the clause by which she was restrained *from living out of [*14] Tiverton, the original bill was dismissed.

In support of the cross-bill, Mr. *Mansfield*, and Mr. *Grimwood*, contended, that a mere voluntary contract would bind the grantor, though it would not be good against creditors; and that its being imprudent, merely, was not sufficient to set it aside; and for this they cited the cases of *Villers v. Beaumont*, 1 Vern. 100; *Boughton v. Boughton*, 1 Atkyns, 625; *Allen v. Arme*, 1 Vern. 365; *Williams v. Codrington*, 1 Vesey, 514; in which last case it was held, by Lord Hardwicke, that a bill would lie for satisfaction, out of assets, of a voluntary contract. The cases which say that the Court will not enforce voluntary contracts, as the conveyance or devise of copyholds without surrender, are all against heirs at law. In one case, a defective conveyance was executed against the heir, *Watts v. Bullas*, 1 Williams, 60; but, although this has been contradicted, and the rule has been not to effectuate such conveyances against the heir-at-law, it does not apply to goods or choses in action. The present subject is not, precisely, in the case of other choses in action, because it passes, by transfer, in the bank-books; yet, it so far passes by the conveyance, as to make the executor a trustee for the assignee; and a bill would lie against the executor to compel a transfer.

Under the covenant, Davy was bound to pay the dividends, from the death of Joan Sarel, to his own trustees. Upon such a covenant, an action of debt would lie.

The *Solicitor-General* cited a case of *Goring v. Nash*, 3 Atk. 189, where *Watts v. Bullas* was declared not to be law.

But Lord Chancellor, said, that wherever a voluntary deed is not sufficient to pass the subject out of the conveyor, (2) it never can be carried into execution, without it is supported by a valuable consideration. (a) The effect of this deed would be, to make the conveyor himself a trustee during his own life; and, in order to raise a trust, there must be a valuable consideration; or, at least, what a court of equity calls a meritorious consideration, such as payment of debts, or making a provision for a wife or child. (b)

His Lordship, therefore, dismissed the cross-bill, (3) as far as it

(2) See the preceding note.

(3) Vide per Lord Eldon C. in *Haywood v. Dimsdale*, 17 Ves. 112; who, referring to this, and other cases, "declared his opinion, that there was a jurisdiction in equity to order a deed which formed a cloud in a title to be delivered up, although the deed were void at law."

(a) See 2 Story, Eq. Jur. ch. 18, § 793 a, § 793 b; *Bunn v. Winthrop*, 1 John. Ch. 336; *Edwards v. Jones*, 1 Mylne & Craig, 226, 237; *Duffield v. Elwes*, 1 Bligh, N. S. 529-531; *Jefferys v. Jefferys*, 1 Craig & Phillips, 138, 141; *Black v. Cord*, 2 Har. & Gill. 100; *Groves v. Groves*, 3 Young & Jer. 163; *Banks v. May*, 3 A. K. Marsh. 436; *Wycherley v. Wycherley*, 2 Eden, 177; *Hale v. Lamb*, ib. 294.

(b) See 2 Story, Eq. Jur. ch. 18, § 793 b.; ch. 25, § 987, and cases cited; *Ellis v. Nimmo*, Lloyd & Goold, 333; *Bunn v. Winthrop*, 1 John. Ch. 336-338; *Minturn v. Seymour*, 4 John. Ch. 498, 500; *McIntire v. Hughes*, 4 Bibb. 187; *Fonbl. Eq. Bk. 1*, ch. 1, § 5, note (c); *White v. Thompson*, 1 Dev. & Bat. 493.

[*15] sought for a transfer of the stock, but left the parties to bring an *action on the covenant, as to the dividends between the death of Jane Sarel and that of the grantor. (4) (c)

(4) This cause came on for further directions, 25th June, 1792, when the jury, at the trial, having found that the deed was entered into *pro turpi causa*, the cross-bill was dismissed. (Mr. Brown's Addenda.) See the terms of the decree, and some of the subsequent proceedings, stated in the report, 1 Ves. jun. 55, 56.

(c) The decree was, that the original bill should be dismissed without costs; that the cross-bill should be retained twelve months, during which time the plaintiffs in it should be at liberty to bring an action upon giving security, to be approved by a Master, to answer the costs of it; on non-compliance with these terms, the bill, at the end of the year, to stand dismissed with costs.

The plaintiffs in the cross-bill did nothing till the 1st November, 1790; when they applied to have the time for bringing the action enlarged for six months, which the Lord Chancellor thought reasonable, and ordered. Upon that order they commenced the action, without giving security for the costs.

Upon the 11th Mr. Mitford moved to amend the minutes of the last order, by inserting the terms contained in the decree; and the Lord Chancellor granted the motion, declaring he meant not to discharge the terms, when he enlarged the time. (From Mr. Vesey's report.) Lord Eldon, in *Hayward v. Dimsdale*, 17 Ves. 112, alludes to the dismissal of the cross-bill in speaking of the jurisdiction of the Court in ordering deeds, &c. to be delivered up; as to which, vide *Ryan v. Mackmath*, the next case. — *Eden*.

RYAN v. MACKMATH.

(Reg. Lib. 1789. B. fol. 23.)

[Whether a court of equity will order bills, notes, or securities, which are void at law, to be delivered up.] (1) A partner, after the partnership ceased, gave a joint note. Bill filed to strike out the plaintiff's (the former partner's) name, have the bill retained for a year, and a trial had; when the plaintiff at law could not prove the partnership, and was nonsuited; yet Lord Chancellor (on equity reserved) refused to decree the name to be erased. (1)

[Equity. Jurisdiction void. Deed. Equity will deliver up a deed, if fraudulently made, though void at law. See *Ryan v. Mackmath*, 3 Bro. Rep. contra. Allowances. Lessee under a lease, void for his own fraud, not entitled to allowances for lasting improvements. *Pierce v. Webb & Stalker*, note.]

THE plaintiff, Philip Ryan, and the defendant, Edward Ryan, had been concerned together in trade as co-partners, but that partnership had ceased in the year 1774. In 1788, Edward Ryan gave a note, in the joint names of himself and plaintiff, to defendant Sarah, now the wife of the defendant Mackmath, as follows: "London, March 2, 1788, four years after date, we promise to pay to Miss Sarah Stuart, or order, the sum of six hundred and fifty pounds, value received, Edward and Philip Ryan." Which note being unpaid, the defendant Stuart brought an action against the plaintiff, upon which he filed the present bill, charging that no co-partnership was

(1) Sir S. Romilly stated, in *Jackman v. Mitchell*, that Lord Thurlow's decision in the principal case was much disapproved of at the time, 13 Ves. 585. Lord Eldon C. observed, in the *Mayor of Colchester v. Lowten*, 1 Ves. & Beames, 244, that his "opinion had always been (differing as it did from others) that a court of equity had the jurisdiction and duty to order a void deed to be delivered up to those whose property it affected." His Lordship had often before expressed himself accordingly; frequently alluding to the practice of the Court of Exchequer, which is noticed in the argument of the principal case with regard to void policies, &c.; and deprecating the idea of a court of equity's suffering such a cloud to remain upon any person's title." See particularly in *Bromley v. Holland*, 7 Ves. 16, 19, 20, 21, and in *Hayward v. Dimsdale*, 17 Ves. 112. Lord Eldon C. also alluded to the same subject in *Jervis v. White*, 7 Ves. 414, 415. See likewise per M. R. in *Hawes v. Wyatt*, 2 Cox, 264, and the case of *Pierce v. Webb*, determined by Lord Loughborough C., 7th Feb. 1792, in the Editor's note to the next page, from Lord Colchester's MSS.

at the time subsisting between them, and that there was no consideration for the note, but it was a contrivance between defendants Edward Ryan and Stuart to injure him, and praying that the note might be delivered up to be cancelled; or if it should appear, that the defendant Stuart gave defendant Edward Ryan any consideration for the same, that he alone might be answerable to her for the same, and that the plaintiff's name might be erased therefrom, and the defendant restrained by injunction from indorsing or negotiating the said note.

Upon the cause coming on to be heard, 28th June, 1788, before Mr. J. Buller, sitting for the Lord Chancellor, he ordered that the cause should stand over till the first day of causes in Trinity term; and that, in the mean time, the defendant Stuart should be at liberty to bring an action against the plaintiff and the defendant Edward Ryan on the note. In pursuance of the order, the defendant Mackmath, and his wife, brought an action against the defendant Edward Ryan and plaintiff Philip Ryan; when, not establishing the partnership to the satisfaction of the jury, and the action being a joint one, they were nonsuited.

It came on again, upon the equity reserved, the first day of causes in the present term, when the Lord Chancellor expressing a *doubt whether he could order the bill to be delivered up, or plain- [*16] tiff's name to be erased, it stood over, to look into cases on the subject. And coming on again, Mr. *Solicitor-General*, and Mr. *Abbot*, (2) for the plaintiff, insisted this was a common equity, upon the ground of bills *quia timet* between reverser and tenant for life, and between surety and principal, *Viner*, tit. *quia timet*; that the evidence given at law, not being sufficient to bind the plaintiff, he ought now to be secured against being harassed by future actions, or having the note negotiated into other hands, when he might no longer be able to make the same defence as he had in the present action. They cited the Bishop of *Winchester* and *Fournier*, 2 *Vesey*, 445, where the note was ordered to be left with the register, and an opportunity given to the defendant to try its validity; and the case of *Bridge v. Eddows*, there cited, where it was proved that the party said to execute was in another place: in that case the Chancellor ordered it to be tried, but it was not, the issue being taken *pro confesso*. Equity, therefore, ought to relieve. In principle, there is no difference between this and forgery. The partnership being at an end, Edward Ryan had no authority to sign the plaintiff's name here: in the case where the name is really written by the party, the Court has relieved, and ordered the security to be given up, as in the case of notes for gaming transactions, and marriage-brokerage bonds. But in this case, the issue having been tried and found against the note, it ought to be given up. (2) In *Whittingham v.*

(2) Mr. Mansfield and Mr. Abbot (now Lord Colchester) were of counsel also for the plaintiff with the Solicitor-General. The Editor finds, amongst Lord Colchester's notes, a transcript of his Lordship's most able argument on the occasion: but he scarcely thinks himself warranted to insert it. It seems, however, proper to observe, that the cases of *Chennel v. Churchman*, and *Minshaw v. Jordan* (which are stated in Mr. Brown's note), were copied by Mr. Brown from Lord Colchester's own notes. Lord Colchester's collection contains a subsequent case upon the subject, which is as follows:—

PIERCE v. WEBB and STALKER. [In Chancery, Feb. 7, 1792.]

This was a bill filed by the purchaser of a leasehold estate at Windsor, stating that in August, 1789, the purchase-deeds were executed, the defendant Webb having expressly represented that the tenants were all at will, and had no leases; but that afterwards defendant Stalker set up a lease for seven years, dated March, 1789.

The bill charged that this lease was a fraud; that it was in fact executed in November, 1789; and that Stalker had actually applied to plaintiff in October, 1789, begging to be continued as tenant; and that he did not pretend to set up this lease till February, 1790.

Thornburgh, 2 Vern. 206, a policy of insurance, obtained by fraud, was ordered to be delivered up. In *Chennel v. Churchman*, † in the Exchequer, 1776, an action had been brought upon notes of hand obtained without consideration, judgment obtained, and execution issued out and executed. The Court ordered the money to be returned, and a perpetual injunction against *tendering or negotiating the notes. In ‡ *Minshaw v. Jordan*, at the Rolls, Mich. 1786, the bill was filed to have a note for 1000*l.* delivered up. It had been obtained from the plaintiff, by the defendant, for procuring the father to make a will in the plaintiff's favor, whom he was inclined to disinherit. The bill was retained, with liberty to the defendant to bring an action at law, and upon the trial,

The prayer was, that this lease might be declared fraudulent, and delivered up to be cancelled; or, if the lease was *bona fide* executed prior to the purchase, then that Webb, the vendor, might make satisfaction, and that issues might be directed for that purpose.

Mitford and Abbott, for plaintiff.

Lloyd and Stanley, for defendants, insisted that there was no equity to sustain this bill; none against Webb, because he has no interest in the lease, which is impeached; and none against Stalker, because it appeared by the answer, that the lease was ante-dated, and that plaintiff, having that discovery, should have dismissed his bill and brought ejectment, where, it appeared by his own witnesses, he could have proved the true execution to have been subsequent to the purchase-deed, and so might have recovered possession at law; and that equity would not compel the delivery of a deed, whereof no use could be made at law. Also that this lease was a rack-rent lease, and no incumbrance within the covenant and representation. Also, they insisted, that Stalker, having proved expenses for lasting improvements, he was entitled to those allowances.

Lord Chancellor decreed for plaintiff, with costs; and ordered the lease to be delivered up to be cancelled, and did not direct any allowance for improvements. He said, it had never been doubted, that if a man would create a forged deed (of which no use could have been made at law), yet equity will interfere and deliver it up; and that this was a gross and scandalous fraud.

† *Chennel v. Churchman*, Exchequer, 22d Feb. 1776. — Bill stated that Edward Bicker-ton, clerk, had, in Mich. 1770, exhibited his bill in this Court against the plaintiff Chennel, setting forth, that, as rector of Ewhurst, in the county of Surry, he was entitled (int. al.) to the tithes of wood and coppice-ground, and prayed the usual account.

Chennel answered this bill, but his defence becoming the common cause of the parish, Churchman, as the occupier of the same parish, encouraged Chennel to persevere in his defence, and promised to advance him money, from time to time, to support it.

Accordingly Churchman advanced several sums of money to Chennel, to the amount of 53*l.* towards the support of the cause, for which he took three promissory notes from Chennel, promising that no improper use should be made of them: but Churchman, soon afterwards, put the three notes in suit against Chennel; and, in order to restrain Churchman from proceeding to recover their value at law, he filed a bill to restrain Churchman from so doing, and praying that the notes in question might be delivered up to be cancelled.

The defendant answered evasively, and the plaintiff proved his case.

At the hearing, the Court declared the notes were put in suit against good conscience, and that the plaintiff was entitled to relief against them, and decreed that the money levied on the execution, viz. 64*l.*, should be repaid to the plaintiff, and that a perpetual injunction should issue, and that it should extend to the indorsing, or further negotiation, of the notes; and, as to that head of equity, decreed the plaintiff his costs.

But in regard to such part of the bill as sought to compel a specific performance of the agreement to reimburse, &c. the Court dismissed it with costs.

‡ *Minshaw v. Jordan*, Rolls, Mich. 1785. Bill filed to have a promissory note for 1000*l.* payable to defendant or order, delivered up, and cancelled, as obtained by fraud and without consideration; the allegation being that it was given to defendant for having procured plaintiff's father to make a will in plaintiff's favor. The bill also prayed an injunction to stay action at law, and prevent negotiation of the note.

Answer — admitted the facts, but insisted the note was not fraudulent, but given voluntarily for defendant's good services, and insisted upon a right to indorse and negotiate.

The decree was, "that the bill be retained till the last day of Easter term next, with liberty to the defendant to proceed in his action, and in default of proceeding to trial in such action, within the time aforesaid, his Honor reserved the consideration of costs, and further directions; and any of the parties to be at liberty to apply."

Upon the trial at law, a verdict was found for the plaintiff, and the cause, in this Court coming on, upon the equity reserved, in Trinity term, 1787, his Honor (Sir Lloyd Kenyon) ordered and decreed, that the defendant should deliver up to the plaintiff the note in question, to be cancelled. And it was ordered, that an injunction be awarded to restrain the defendant from proceeding at law on the said note; and the same to be perpetual. And it was further ordered, that the defendant do pay unto the plaintiff costs of this suit, &c.

the plaintiff obtained a verdict; and, upon the cause being set down on the *postea*, there was a decree, that the defendant should deliver up the note; and, though there might have been a defence at law, [*18] Lord Kenyon said this Court had a concurrent jurisdiction. But, in the present case, the equity of the case is admitted by the Court's having retained the bill. It is a necessary consequence of such retainer, that the remedy is admitted to be in equity. It would, otherwise, be a fraud upon the suitor; and the point has been determined in the case of the Duke of Leeds v. *New Radnor*, (ante, vol. ii. p. 518.) (3)

Mr. *Fontblaque*, for the defendant, insisted that, in this case, the defence was at law, where it would be incumbent on any person bringing an action to prove the partnership. That the cases have all proceeded on the ground of there being no defence at law, on which circumstance the equitable relief depends. 1 Vern. 98; *Law v. Law*, Forrester, 140; Lord Talbot said, that the bond being good at law, was the ground of relief here. He likewise referred to *Hanington v. Du Chatel*, ante, vol. i. p. 124.

Lord CHANCELLOR said — The point turned upon the extent of the relief; and that, in order to decree the bill to be delivered up, or the name erased, he must determine that wherever one party hath an instrument upon which he cannot maintain an action at law, he must be decreed to give it up. That the bent of his inclination was against laying down the rule to this extent; and the cases rather tended to the contrary opinion. In *Minshaw v. Jordan*, there was, not only no good consideration, but there was a bad one. He thought, therefore, he could not make the decree. (a)

(3) It is, however, "by no means a necessary consequence that the Court will not ultimately determine against a plaintiff in equity, because the bill has been retained." See per Sir W. Grant, M. R. in *Harwood v. Oglander*, 6 Ves. 225; and *Geast v. Barber*, ante, 2 vol. 61, with the Editor's note.

(a) The jurisdiction of a court of equity in such a case is now maintained in its fullest extent. 2 Story, Eq. Jur. ch. 17, § 700, § 698, § 699; *Hamilton v. Cummings*, 1 Joln. Ch. 520 - 524, and the cases cited; *Simpson v. Howden*, 3 Mylne & Craig, 104, 105; *Piersoll v. Elliott*, 6 Peters, 95; *Duncan v. Worrall*, 10 Price, 31; *Pettit v. Shephard*, 5 Paige, 493; *Torrey v. Buck*, 1 Green, Ch. 367; *Jones v. Perry*, 10 Yerger, 59; *Thompson v. Graham*, 1 Paige, 384; *Leigh v. Everhart*, 4 Monro. 380; *Maise v. Gower*, Mar. & Yerg. 383; *M'Meeke v. Edmonds*, 1 Hill, Ch. 295.

But where the illegality and nullity of an instrument appear on its face, courts of equity will not interpose their authority to compel such instrument to be delivered up. 2 Story, Eq. Jur. ch. 17, § 700 a; *Gray v. Mathias*, 5 Ves. 236; *Simpson v. Howden*, 3 Mylne & Craig, 97, 102, 103, 108. See *Piersoll v. Elliott*, 6 Peters, 95, 98 - 100. *S. P. Threlfall v. Luut*, 7 Sim, 627. But see *Jones v. Perry*, 10 Yerger, 59, and note of Mr. Eden, below.

The fact, that an instrument appears void on its face seems, however, not to have been regarded as creating a distinction in *Jones v. Perry*, 10 Yerger, 59. See also the note which follows, of Mr. Eden. [Where the defect in the deed appears upon the face of it, the objection which is usually made to this jurisdiction is, that the demand must be made upon the production of the instrument, and, if that is produced, can never be supported. The subject has received great consideration in several cases, and particularly in *Bromley v. Holland*, 7 Ves., 3, Coop. Rep. 9, in which a decree of Lord Alvanley, reported 5 Ves. 610, was reversed by Lord Eldon. His Lordship observed, that though he did not go the length, that if it is clear that no use can be made of the instrument, that is ground enough for the equitable jurisdiction to take it out of the possession of the party, who can make no use of it beneficial to himself: but if a use might be made of it prejudicial to another, he should have an inclination to support the jurisdiction to transfer the possession from him to whom it could be of no use, to him to whom it might be useful, and in whose possession it would be prejudicial to no one. In answer to the objection, as to the defect apparent of the instrument, his Lordship observed, first, that the demand might be as frequently made as vexation might dispose the party to make it; and, in the next place, that where the instrument purports to affect real estate, it is not just to consider it merely having regard to the question, whether the demand can be directly founded upon it, as the instrument might in many instances defeat the ends of justice, by forming (what is called in several passages in these cases, 5 Ves. 506, 7 Ves. 21, 17 Ves. 112,) a cloud upon the title; vide, upon this subject, *Byne v. Potter*, ib.

But, the defendants consenting that the name should be struck out of the note, his Lordship said, he would consider whether he should dismiss the bill with costs.

His Lordship, afterwards, ordered the bill to be dismissed, without costs. (*b*)

609. *Franco v. Bolton*, 3 Ves. 363; where Lord Rosslyn, upon grounds which have been disapproved of by Lord Eldon, 7 Ves. 19, refused to order the instrument to be delivered up. *Hewman v. Milner*, 2 Ves. jun. 483; *Duffy v. Atkinson*, 8 Ves. 583; *Lisle v. Liddell*, 3 Anstr. 649; *Underhill v. Horwood*, 10 Ves. 218; *Jackman v. Mitchell*, 13 Ves. 581; *Haywood v. Dimsdale*, 17 Ves. 111. See also the practice upon bills to have void policies of insurance delivered up in the Court of Exchequer, alluded to, 7 Ves. 20, 21; *Sowerby v. Warder*, 2 Cox, 269, overruling *Stackpoole v. Modigliani*, cit. ib. — *Eden*.]

(*b*) In a note to *Story, Partnership*, ch. 14, § 329, the learned author, speaking of this case, says, that the doctrine of Lord Thurlow would seem to be unsatisfactory, and inconsistent with sound principles, as between partners. But see *Webster v. Webster*, 3 Swanst. 491, and note; & *Lewis v. Langdon*, 7 Sim. 421.

[*19] **DICKINSON v. DICKINSON*. Rolls, Nov. 16, [and Dec. 1.]

(Reg. Lib. 1789. A. fol. 151.)

Where there are adult and infant legatees, whose legacies are charged on a real fund; though the adult legatees have a right to have their legacies immediately raised, and, for that purpose, a sale may be necessary, and the heir offers the residue of the purchase-money to be laid out, as a security for the interest, of the legacies given to the infants when due, the Court will not deprive them, in case of deficiency, of recourse to the real fund. (1)

RICHARD DICKINSON, by his will and codicils, devised his estate in Northamptonshire, to the defendant John Baron Dickinson, in fee, "subject, nevertheless, and chargeable as therein followed; that is to say, he thereby charged the same with the payment of 3000*l.* to the plaintiff Sarah French, to be paid her within one year after his death;" and then he, in like manner, charged the same with the payment of 1500*l.* to the plaintiff Anna Maria Roberts (an infant), and with the payment of the like sum to Martha Ann Roberts (also an infant), to be paid to them respectively, at their ages of twenty-one, or days of marriage, with interest, at 4 per cent., in the mean time. The testator also charged the estate, in like manner, with payment of a sum of 5000*l.* to the plaintiff Oliver Dickinson. After the testator's death, John Baron Dickinson agreed with Thomas Perkins for sale of the estate, for the sum of 12,000*l.*; the above charges thereon amounted to 11,000*l.*, but Perkins refused to take the title, unless the estate was fully discharged from the several sums of money charged thereon by the wills and codicils.

The bill was filed by Oliver Dickinson, Sarah French, and the two infants Anna Maria Roberts and Martha Ann Roberts, against John Baron Dickinson and Thomas Perkins; praying that Perkins might perform his agreement for the purchase of the estate, and that, out of the purchase-money, Oliver Dickinson and Sarah French might be paid their respective legacies of 5000*l.* and 3000*l.*, and that the several sums of 1500*l.* and 1500*l.* might be properly secured for the benefit of the infant-plaintiffs, when they should respectively become entitled thereto.

On the original hearing of the cause, his Honor referred it to the Master, to inquire and state what was the annual value of the estate, and

(1) Vide *Sugden on Vend. and Purch.* 438, 439.

whether it would be for the benefit of the infants that the contract with Perkins should be carried into execution.

The Master, by his report, certified that the annual value of the estate was only 400*l.* and that, as that was not sufficient to *keep [*20] down the interest of the sums of money charged thereon by the testator's will and codicils, he conceived it would be for the benefit of the infants that the contract entered into with Perkins should be carried into execution.

The cause coming on now for further directions, his Honor entertained some doubts how he could take from the infants the security of the real fund: for, if the money were now raised, and invested in government-securities, it was very possible, that at the time when they became entitled to receive their legacies, the fund might have fallen considerably in value, and might not produce the amount of the legacies.

It was insisted by Mr. *Mitford*, that the several charges being created by the will and codicils for the respective plaintiffs without any priority, the plaintiffs who were adult had a right to have their legacies raised immediately, and that, if the legacies of the adult plaintiffs could not be raised without at the same raising the legacies of the infants, the consequence was, that the legacies of the infants must be raised, and they must abide the consequences; that it was evident, in this case, the adult plaintiffs could not have their legacies raised without having the legacies of the infants raised at the same time; for, considering, how nearly the sum of the several legacies approached to the sum now offered by Perkins, and that the price was at the rate of thirty years' purchase, it would be impossible to raise 8000*l.* by mortgage, leaving at the same time a further charge of 3000*l.* on the estate in the hands of the mortgagee. However, that, in the present case, it was not required that an appropriation should be made by way of payment of the infants' legacies; but it was proposed that 3700*l.* should be invested in the public funds as a security for the two legacies when the infants should become entitled to them.

After some consideration, his Honor made the decree that the contract should be carried into execution, and that the 8000*l.* should be paid to the legatees who were adult, upon the defendant John Baron Dickinson consenting that the 4000*l.* residue of the purchase-money, after payment of the legacies of Oliver Dickinson and Sarah French, should be invested in government-securities, to remain, together with all accumulations thereof, *as a security for the payment of the legacies to the [*21] infants when they should become entitled, and undertaking to pay all parties their costs; and his Honor said, if, in the event, the fund should turn out deficient for the payment of the infants' legacies, they must still have recourse to the estate for the deficiency. (2) (a)

(2) By consent, the purchaser was ordered to pay the 4000*l.* into Court, out of which one moiety of what should be found due for the interest of the two legacies of 1500*l.* was to be carried over to the respective accounts of the infants, and he laid out accordingly. The residue of the 4000*l.* was then to be laid out, and out of the interest thereupon two sums of 50*l.* were to be carried over to the respective accounts of the infants, to answer the future interest of their legacies, and be laid out for their respective benefit. The residue of the interest was to be laid out from time to time. " And by the like consent his Honor doth declare, that the annuities to be purchased with the residue of the said sum of 4000*l.* after answering the interest now due on the said legacies to the several plaintiffs the infants, and the bank annuities to be purchased with the residue of the interest of the legacies of the said plaintiffs the infants, &c. are to be a security for the payment of the principal of their said legacies, [upon which payment] the said estate will be discharged from the same, and the said plaintiffs, the infants, when they shall respectively become entitled to their said

(a) See 2 Sugd. Vend. & Purch. (6th Am. ed.) 102, [154,] 105, [158,] 3 ib. 100 [156]; 2 Story, Eq. Jur. ch. 31, § 1133.

legacies and interest, are to be at liberty to apply to the Court for a transfer of the bank annuities, in which the interest of their said legacies shall be respectively invested, and also for payment of the principal of their said legacies, as they shall be advised. But this is to be without prejudice to the rights of the said plaintiffs the infants, in case the aforesaid fund shall not be sufficient for the payment of the principal of the said legacies at the respective times aforesaid, together with the interest due thereon, [in which case they are to be at liberty] to apply to the Court to have the deficiency raised out of the said estate. But in case the said fund shall be more than sufficient for that purpose, then the defendant J. B. D., on the last of the said plaintiffs the infants becoming entitled to her said legacy, is also to be at liberty to apply to the Court for a transfer of the surplus of the bank annuities, herein-before declared to be considered as a security for the principal of the said legacies; and the said defendant J. B. D., consenting to pay all the other parties their costs of this suit, it is ordered," &c.

VANDERZEE v. WILLIS.

(Reg. Lib. 1789. B. fol. 403.)

Bankers, having securities deposited as a pledge for 1000*l.*, though the depositor at his death is indebted in a larger sum, have no lien further than the 1000*l.* (1)

BILL by the widow and executrix of James Vanderzee, deceased, to redeem securities (a) pledged by the testator to the house of Moorhouse and Co. bankers, of which the defendants are the present partners. The case was as follows: In the year 1778, the deceased kept an account with the house of Moorhouse and Co. as bankers; and, upon the 10th of August in that year, he borrowed of the then partnership 1000*l.* (having then 400*l.* in the hands of the house), and gave a promissory note, and deposited several bonds and other securities as a pledge for the repayment thereof. These securities were frequently changed by Vanderzee; and, as one was taken away, another of equal value was deposited in its room. In 1784, Vanderzee, owing the above 1000*l.* and about 400*l.* on his banking account, the partnership required an assignment of the securities, and Vanderzee, being an attorney, prepared a bond and deed-poll for securing 1000*l.* although there were 400*l.* more then due; and Vanderzee over-drew his account, after the execution thereof, and was at his death, in 1785, indebted to the partnership in the sum of 541*l.* over and above the 1000*l.*

The bill prayed that the plaintiff might redeem, on payment of 1000*l.* and interest only, insisting that the deposit was made as a security for that sum only; and the rather, as a larger sum was then due, and that the defendants had no lien on the securities for any further sum; and also stated, that the personal and fee-simple real estate of the testator were not more, or little more, than sufficient to pay his specialty debts; and that a

(1) Sir William Grant, M. R. speaking of this case says, "In Vanderzee v. Willis, there was an assignment of bonds to secure 1000*l.* borrowed by the testator from his bankers. At that time he was indebted to them in *more*; and he continued indebted *in more* to his death. His executrix filed a bill to redeem. The bankers insisted upon the right to tack; and so standing the case it would I think have been held that they must be paid the whole; but it was insisted that a bill had been filed by creditors and a decree made. Lord Thurlow seems to have held, that would have made it a question with creditors, not with the executrix simply, stating the principle; that where the equity has passed to an assignee you cannot insist upon retaining against the assignee." See in Adams v. Claxton, 6 Ves. 229, &c. See also on this case, and upon the subject of tacking in general, Jones v. Smith, 2 Ves. jun. 372, 379, &c.; Adams v. Claxton, *ubi supra passim*. Ex parte Knott, 11 Ves. 609; Baker v. Harris, 16 Ves. 379, &c., and the notes to Robinson v. Davison, ante, 1 vol. 63.

(a) As to this proceeding in such case, and whether the creditor is bound to wait for a bill of foreclosure and a decree of sale, see Hart v. Ten Eyck, 2 John. Ch. 100; Johnson v. Varnon, 1 Bailey, 527; Perry v. Craig, 3 Missou. 516; 2 Kent (5th ed.), 582, 583.

bill had been filed by creditors against the present plaintiff and the heir-at-law, in which suit there had been a decree for the creditors to come in.

*The defendants insisted, by their answer, upon a right to [*22] retain the securities to the amount of their whole demand; stating their practice to be, never to suffer a customer to overdraw his account more than 1000*l.* without security; and that it was intended by the partnership, that the assignment should cover as well the balance due, and to become due, from Vanderzee on his cash account, as the 1000*l.* and interest; and that the partners always considered themselves to have a lien upon the securities for the whole debt.

Mr. *Solicitor-General*, and Mr. *Ainge*, for the plaintiff. If Vanderzee had himself brought a bill, he would have had a right to redeem upon payment of 1000*l.* with interest only. It is impossible that the bankers, could, at the time they took the security, consider it as being for more than 1000*l.* as he was then indebted to them 400*l.* more. Then the question is, whether the executrix has not the same right he would have had if living. She must be charged with the amount of the securities above 1000*l.* as assets to pay specialty debts.

Mr. *Mansfield*, Mr. *Schoyn*, and Mr. *King*, for the defendants. Whoever comes into a court of equity must do equity. If Vanderzee had filed a bill, he would have been told, that making the security for 1000*l.* only, when he ought to have made it a security for all the money due, was a gross fraud upon the defendants. The defendants, certainly, meant to strengthen the security they had by the former deposit; for it is material that the security had been deposited seven years before; they could not mean to take a security for a less sum: this shows the plaintiff ought not to prevail in a court of equity. But, supposing this to be a security for 1000*l.* only, the defendant would have a right to tack any simple contract debt, and the executor cannot redeem without paying the whole. *Demainbray v. Metcalf*, Pre. Ch. 419, 2 Vern. 691, 698, which was a pledge of jewels. *Coleman v. Winch*, 1 Wms. 775. If there was a bill filed by a specialty creditor, it is true he would be entitled to redeem upon paying the 1000*l.* only; but this is not a bill by a specialty creditor. The heir shall not redeem the mortgage debt, without paying a bond debt to the same creditor. It has never been objected, in that case, that there may be a judgment creditor. This case is exactly the same, for here the chattels *to be recovered will be assets to [*23] pay the simple contract debts.

LORD CHANCELLOR. All the cases agree, that if the executor assigned the equity of redemption, it would put an end to the tacking: so it would, if the specialty creditor brought the bill. I am afraid the rule has been laid down too broad, and that, there being a decree for creditors to come in, they must redeem on payment of the 1000*l.* with interest. (b)

(b) A former debt due to the pledgee, or a subsequent debt contracted by the pledger, does not authorize the pledgee to retain a pledge, given for another demand, unless, from all the circumstances, there is just ground of presumption, that this was the intention of the parties. Story on Bailments, ch. 5, § 304, § 310, § 348; 2 Kent (5th ed.), 584; *Jarvis v. Rogers*, 15 Mass. 389; *Gilliat v. Lynch*, 2 Leigh, 493.

It is said, however, to be presumed, that a pledgee would not let a subsequent sum of money with the pledge in his hands except on the credit of it; and this presumption is said to stand for verity against the pledger himself, though not as against his creditors, or against subsequent purchasers. 2 Story, Eq. Jur. ch. 27, § 1034.

As to tacking of mortgages, see *Robinson v. Davison*, 1 Bro. C. C. 63, and notes; *Lowthian v. Hessel*, post, 162.

GOATE v. FRYER. [19th Nov.] [S. C. 2 Cox, 201.]

(Reg. Lib. 1789. A. fol. 12.)

When there is a bill filed against an executor and decree *quod computet*, and that creditors shall come in, if a creditor brings an action, an injunction shall issue to stay trial as well as execution: (1) but if the action be brought before the bill filed, and he chooses to discontinue, he shall be allowed to prove his costs at law, in addition to his debt.

THE defendant having brought an action at law against the plaintiff, as administratrix of her husband, she pleaded *plene administravit*, and filed a bill for an injunction to stay the plaintiff's proceedings at law, a bill having been filed here for an account, and a decree *quod computet* made the same day on which she had pleaded the plea of *plene administravit* to the defendant's action; and, upon the bill filed, she obtained the common injunction, that the plaintiff at law might receive a plea; or, for want of one, proceed to judgment, but execution was thereby stayed.

Mr. *Harvey* now moved, that the injunction might be extended to stay trial; insisting that, after a decree, such injunction ought to go. He cited *Martin v. Martin*, 1 Vesey, 211, and *Kenyon v. Worthington*; (2) where, there being lands descended, and a bill by creditors, in which there was a decree, other creditors bringing actions at law, the present Chancellor had ordered an injunction to stay trial, the property being in the hands of the Court.

Mr. *Graham*, on the other side, insisted that there was no ground to extend the injunction to stay trial, as it would prevent the plaintiff at law from falsifying the plea of *plene administravit*, and, if it should be proved false, having costs, personally, against her.

LORD CHANCELLOR doubted whether the injunction ought to be [*24] extended to stay the trial. He said, that, supposing this *to be a bill for the discovery of that which would be an answer to the plea, it would be extraordinary that the trial should be restrained absolutely. The question was, whether it ought to be the course of the Court to stay the whole proceeding, after a decree *quod computet*, or only to stay execution.

The motion stood over, and, upon a subsequent day, LORD CHANCELLOR said, he was convinced the injunction ought to extend to stay the trial: but, as the action was commenced before the bill filed, the creditor, if he came in under the decree, and discontinued his action, should be entitled to prove his costs at law in addition to his debt: but, if he chose to let his action remain till he saw what became of the fund, then the action must remain suspended. (a)

He therefore granted the order, that the injunction should (3) issue without the usual clause.

(1) See the Editor's note to *Brooks v. Reynolds*, ante, 1 vol. 183.

(2) 2 Dick. 668, upon which see the observations of Lord Eldon C. in *Perry v. Phillips*, 10 Ves. 40.

(3) "Extend to stay trial; but if the defendant discontinued his action, he was to be at liberty to prove the costs of the action as a debt under the decree." — R. L.

(a) See *Eden on Injunctions* (2d Am. ed.), 54; *Brooks v. Reynolds*, 1 Bro. C. C. 183, 185, and notes and cases cited; 1 Smith, Ch. Pr. (Am. ed.) 610; 1 Story, Eq. Jur. ch. 9, § 549, 550, notes; 2 Williams, Ex. Pt. 3, Bk. 2, ch. 2, § 5, p. 681, 682; Pt. 5, Bk. 1, ch. 2, p. 1178, 1179; 2 Madd. Ch. Pr. (4th Am. ed.) 490, 491; *Ram on Assets*, ch. 24, § 3, p. 300.

BURKE v. VICKARS.

(Reg. Lib. 1789. B. fol. 679. b.)

Affidavit, of the merits, must accompany motion for an injunction to stay proceedings, where plaintiff at law is abroad; but need not accompany the application, that service of the *subpœna* upon the attorney may be good service. (1)

MR. STANLEY moved, That service of the *subpœna*, in an injunction-bill, upon the attorney at law, should be good service, the plaintiff at law being abroad, upon an affidavit that the attorney had been applied to, and had refused to accept the *subpœna*; but there was no affidavit of truth of the equity of the bill.

LORD CHANCELLOR said— He had thought of this matter, and although, if the practice were to settle anew, he should think it were better that the affidavit of merits should be made in the first step of the cause; yet, as, if the attorney does not appear, nothing can be done, he thought it was sufficient that the affidavit of merits should accompany the motion for the injunction. (2)

(1) It is now clear, and admitted, that this decision is quite wrong: the contrary had, indeed, been decided but a very short time before, vide *Delancy v. Wallis*, ante, 12; and it is now settled that, in chancery, the affidavit of merits must, in such a case, accompany the motion that the *subpœna* may be good service. See the Editor's notes to *Delancy v. Wallis*, ante, 12; and to *Revet v. Braham*, ante, 2 vol. 240. < 1 Smith, Ch. Pr. (Am. ed.) 605, 606; 2 Madd. Ch. Pr. (4th Am. ed.) 198; Eden on Injunctions (2d Am. ed.), 79. > [It is not necessary that the affidavit should state the previous refusal by the attorney to accept the *subpœna*, *French v. Roe*, 13 Ves. 593; Lord Redesdale, in *Smith v. The Hibernian Mine Company*, 1 Sch. & Lef. 239, observed, that the case of executors living abroad, and giving a letter of attorney to a person to prove the will, in which service on that person has been held good (as in *Hales v. Sutton*, 1 Dick. 26), seems to be of the same description as the present. For the cases in which service on clerks in court, or agents, has been held not to be good service, vide *Bond v. The Duke of Newcastle*, post, 386. — *Eden*.]

(2) A demurrer was afterwards allowed to the bill in this suit. R. L. 1789. A. fol. 98.

*RAY v. FENWICK.

[*25]

(No Entry.)

Ne exeat regno refused at suit of assignee of a bond, the original obligee being dead without representatives. (1)

A BOND had been given by the defendant to Saunderson, and by him assigned to plaintiff; Saunderson was since dead, and nobody had administered to him.

Mr. Richards moved, on the part of the plaintiff, for a *ne exeat regno* against the defendant, on an affidavit that he was going abroad, and in order to give the plaintiff time to obtain administration to Saunderson.

LORD CHANCELLOR refused to order the writ to issue; because the suit, without a representative of the original obligee in the note, must be dismissed for want of parties. (1)

(1) Mr. Beames, who has paid particular attention to the subject, observed to the Editor, that the above decision (as reported) seems very questionable; since the very object of the plaintiff's application was to secure the fund until he could bring the representative of the obligee before the Court; and that with regard to the reporter's statement as to dismissing the bill for want of parties, the Court had long abandoned such practice, and always suffered a plaintiff to amend by adding parties, even at the hearing. See upon this, *Anon.* 2 Atk. 15;

Jones v. Jones, 3 Atk. 111, and Beames, El. Pl. 155. Upon the point and subject of these writs in general, see Beames, on *ne exeat*, 56, &c.; Storey v. Higgins, post, 476; 1 Ball & Beatt. 326; Atkinson v. Leonard, post, 218; Shearman v. Shearman, and Parker v. Appleton, post, 370, 427. < Story, Eq. Pl. ch. 4, § 153, ib. ch. 10, § 541, and note; 2 Madd. Ch. Pr. (4th Am. ed.) 193. >

JOLLIFFE v. EAST and Others.

(Reg. Lib. 1789. A. fol. 170.)

Legacy of 10,000*l.* to two sisters, to be equally divided when they should arrive at twenty-one, is a tenancy in common, and one dying under twenty-one, her share shall go to her representative. (1) Where a testator expresses himself so ambiguously as to make it necessary to come to this Court, the costs shall be paid out of his general assets. (2)

JANE JOLLIFFE, deceased, by a memorandum, signed by her April 10, 1775, left to her brother William Jolliffe's two eldest daughters, Eleanor and Sophia Jolliffe, the sum of 10,000*l.*, to be equally divided between them when they should arrive at the age of twenty-one years; and that sum to carry interest for them, from the time of her the said testatrix's death, until they should arrive at the above age; and begged the plaintiff (Thomas Jolliffe) would execute the said memorandum as her last request. The testatrix died on the said 10th of April, 1775, and the plaintiff proved the memorandum in the ecclesiastical court.

The said Sophia Jolliffe (one of the legatees) died 8th April, 1784, without having attained her age of twenty-one years, intestate, and her father (the defendant William Jolliffe) took out administration to her; and the plaintiff, apprehending that each of the legatees had a vested interest in a moiety of the said legacy, and the defendant William Jolliffe having so insisted, and that he as administrator to Sophia was entitled to her moiety, the plaintiff paid the sum of 5000*l.* to the said defendant, with interest from the death of the testatrix. Eleanor, the other daughter [*26] ter, intermarried the 3d May, 1788, with the defendant *East, and has not attained her age of twenty-one years, and her 5000*l.* was made a subject of settlement on that marriage. The bill suggested that East and Eleanor his wife, and the trustees in their settlement insisted, that Eleanor and Sophia were joint tenants of the legacy of 10,000*l.*, and that, by the death of Sophia, she, Eleanor, was become entitled to the whole. The plaintiff's bill, therefore, prayed that it might be declared, whether Eleanor was entitled to the whole, or only to 5000*l.*, and proper accounts might be taken, offering to pay the 5000*l.* and interest, and that, if the Court should be of opinion that Eleanor was entitled to the whole, the defendant William might pay the 5000*l.* and interest paid to him, or repay the same to plaintiff.

Mr. *Solicitor-General*, for the defendants East and his wife, contended that this was a joint-tenancy till twenty-one, though divisible then, and that Eleanor was entitled to the whole.

The memorandum is, to the two eldest daughters Eleanor and Sophia 10,000*l.* Had it stopped here, it would clearly have been a joint-tenancy. In *Perkins v. Baynton* (antea, vol. i. p. 118), it is said, "That residuary legatees, not being executors, will always take as tenants in common;

(1) See *Jenour v. Jenour*, 10 Ves. 569; and the several other cases, with the Editor's observations, in the Editor's note to *Perkins v. Baynton*, antea, 1 vol. 118.

(2) See also accordingly *Baugh v. Reed*, post, 192; *Studholme v. Hodson*, 3 P. W. 303, and *Jenour v. Jenour*, 10 Ves. 571, 572, &c.

though executors will take as joint-tenants." But the authorities seem doubtful as to this: in *Webster v. Webster*, 2 P. Wms. 347, one having devised the residue of his personal estate to three persons, it was held by the Court to create a joint-tenancy. That was decided in 1726. In 1729, *Cray v. Willis*, 2 P. Wms. 529, was decided, and it was there also held, that the residuary legatees were joint-tenants; though it is true that they were, in that case, also executors. In *Cray v. Willis*, it is said that the leading authority on this subject is *Lady Shore v. Billingsby*, 1 Vern. 482, and Sir Thomas Jones, 162, S. C. where it was held that a surplus of a personal estate devised to A. and B. was a joint devise, and should survive; and that case is called the last authority on the subject, which is a singular circumstance, as *Webster v. Webster* was so late. As to *Webster v. Webster*, no decree is to be found in the Register's book, nor is there any minute to be found in the Register's Minute-book. The case of *Lady Shore v. Billingsby* is differently reported in Vernon, and in Sir Thomas Jones; but, upon examining the Register's book, it appears that the report in Vernon is the most correct. (3) It does not, indeed, there appear, whether *the residuary legatees were or [*27] were not executors; but, upon searching the original will in Doctors' Commons, it appears that one of the residuary legatees was executor, the other not. Therefore, on the authorities, it appears that the first clause of the bequest, in this case, would make them joint-tenants. Then the question is, whether the words "equally to be divided between them, when they shall arrive at the age of twenty-one years," shall make any difference. We insist the meaning of the will was, that, if they lived to attain twenty-one, the fund should be divided; till then they had it jointly; and therefore, Sophia having died under twenty-one, Eleanor took the whole.

Then, as to the clause relative to the interest, that is joint, and confirms the construction. The Court might have applied the interest for maintenance, during infancy, in different shares, according to the exigencies of the infants at different ages, there being nothing in the will to control it.

LORD CHANCELLOR—(without hearing the other side) I believe it is very well understood that the Court decrees a tenancy in common as much as it can. (a) If, indeed, there are no words that will point at a tenancy in common, the rule of survivorship must take place. (4) But I think it pretty clear that the words in this will are sufficient to create a tenancy in common. (b) As to the costs of the suit, wherever a testator has expressed himself so ambiguously as to make it necessary to come into this Court, his general assets must bear the costs. (5) (c) His Lordship, therefore, declared that Eleanor and Sophia were entitled as tenants in common, and the costs of the suit should be paid out of the assets.

(3) See also in *Stuart v. Bruce*, 3 Ves. 633; and the case in Mr. Raithby's edition of Vernon.

(4) Vide *Morley v. Bird*, 3 Ves. 629, the Editor's note to *Perkins v. Baynton*, ante, 1 vol. 118, and per. M. R. Campbell v. Campbell, post, 4 vol. 17.

(5) Vide note (2) ante, p. 25.

(a) See 4 Kent (5th ed.), 361, 367, 368; 1 Hilliard's Abr. Law of Real Estate, ch. 54, p. 439; Gould v. Kemp, 2 Mylne & Keen, 309; Shaw v. Hearsey, 5 Mass. 622.

(b) *Drayton v. Drayton*, 1 Desaus. 329; *Stewart v. Garnet*, 3 Sim. 399; *Westcott v. Cady*, 5 John. Ch. 334; *Perkins v. Baynton*, 1 Bro. C. C. 118, and notes.

(c) *Sawyer v. Baldwin*, 20 Pick. 388, 389; *Pearson v. Pearson*, 1 Scho. & Lefr. 12; *Barington v. Tristram*, 6 Ves. 345; 2 Madd. Ch. Pr. (4th Am. ed.) 568.

DORAN v. ROSS.

Lincoln's-Inn-Hall, 4th Dec. [S. C. 1 Ves. jun. 57.]

(Reg. Lib. 1789. A. fol. 68. b.)

The expression of a deed cannot be varied without some recital to justify the construction. (1)

IN the marriage settlement of the plaintiff with Ann Dancastle, there was a life-estate, in 320*l.* a year annuities, given to the husband for life; and there was a provision made of 500*l.*, in case of the death of the wife without children, for her nephew; but it was so expressed as to stand doubtful whether, in that event, the whole did not go over to the nephew. It was a question of construction, whether the word *her* should not be construed *his*.

[*28] *Lord CHANCELLOR refused parole evidence to explain the intention of the deed; and then said, that, if there was any recital to which the expression in the deed was contrary, he should consider which were the means to come at it; (a) but that, without some such guide, he could not change the words of the settlement. That there was no authority on which he could do that. (2) (b)

(1) Because it is contrary to all policy and justice, and the very spirit of the statute of frauds.

(2) The bill was dismissed, but without costs. — R. L.

(a) 1 Madd. Ch. Pr. (4th Am. ed.) 65, 66.

(b) See Broadmead v. Wood, 1 Bro. C. C. 77; Northumberland v. Egremont, 1 Eden, 435.

BENNET v. BATCHELOR.

Lincoln's-Inn-Hall, 7th Dec. [S. C. 1 Ves. jun. 63.]

(Reg. Lib. 1789. A. fol. 70.)

Where the residue is given to a person who dies in the life of the testator, by which the gift is lapsed; (a) still the executors, though they have no legacies, are trustees for the next of kin. (1)

FRANCIS HAMLIN made his will, 6th October, 1770, whereby, after several devises and bequests, he gave as follows: "Also I give and bequeath unto the above-named Jenny Powel (to whom he had before devised real estates, and also had given specific bequests) *all* my household goods, books, linen, wearing apparel, and all other, not before bequeathed, goods and chattels that I shall be in possession of at the day of my decease (except the plate and legacies before and hereafter given and bequeathed); also, I give and bequeath unto the said Jenny Powel all moneys that shall be due to me from my tenants, or other persons, at the time of my decease, that she may be enabled to pay all my just debts, dues, and demands whatsoever, due from me to any person or persons at the time of

(1) See particularly Dawson v. Clarke, 19 Ves. 247, 254; and the Editor's observations, Supplement to Vesey, sen. 318. Upon the general subject, see the Editor's notes to Martin v. Rebow, ante, vol. i. 154; Bowker v. Hunter, 1 vol. 328, &c.; Oliver v. Frewin, ibid. 590; Mence v. Mence, 18 Ves. 348; Hill v. Smith, 1 Swanston, 195, &c.

(a) See Maybank v. Brooks, 1 Bro. C. C. 85, and note (b).

my decease." He gave to Francis Warden, William Beard, and Walter Batchelor, ten pounds a piece for mourning, and appointed Francis Warden, Walter Batchelor, Jenny Powel, Thomas Martin, and John Allen, executors, and charged the said Jenny Powel with the payment of all his debts, legacies, and funeral expenses. Jenny Powel died in the lifetime of the testator, by which the bequest to her lapsed; and the next of kin of the testator filed this bill against the defendants, the executors, for the residue; insisting that, the residue having been given, they were executors in trust only.

Mr. *Solicitor-General*, for the plaintiff, insisted, that, wherever the residue is given away, though the party to whom it is given dies in the lifetime of the testator, it excludes the executor from taking the residue; for this position he cited the Bishop of *Cloyne v. Young*, 2 Vesey, 91.

*He was stopped by the Lord Chancellor, who desired to hear [*29] the other side.

Mr. *Mitford*, for the defendants, contended, 1st, that the bequest to Jenny Powel was a specific, not a residuary, bequest: it is a gift of household goods, books, linen, wearing apparel, and other unbequeathed goods and chattels. This must be confined to goods and chattels *ejusdem generis*, and is not a general disposition of personal property; it would not pass leasehold estates, horses, carriages, or money in the public funds. He has, afterwards, given particular sums of money to be paid by his executors; and has also, particularly, given debts due to him, which shows he did not conceive they would pass by the general clause.

LORD CHANCELLOR. He might not know that debts would pass by the words goods and chattels, and was therefore desirous of giving, particularly, what did not appear, to a common understanding, to pass. If Jenny Powel was alive, there could not be a doubt of this passing the property as a residuary clause.

Mr. *Mitford*. The gift of a sum of money for mourning has been held not to deprive the executor of a right to the residue, *Bufar v. Bradford*, 2 Atk. 220: but if it did, here are two executors who have no legacies. The executors are, therefore, under the determinations, entitled to the residue. It has been held, that, though a particular residue is given away, yet, if it lapses by the party dying in the life of the testator, the executors shall take, *Wilson v. Ivat*, 2 Vesey, 166, (2) which is somewhat differently stated in the Register's book, from the report of it. Norman, by will, gave to Ann Wilson, his god-daughter, a copyhold estate; and he gave to his wife his household goods, stock of cattle, moneys, and securities for money, debts, &c., and appointed her and the defendant, executors: the wife died during his life, and the plaintiffs filed their bill as next of kin: the bill, as far as it sought an account and distribution of the personal estate, was dismissed with costs. (3) The cases are in some degree contradictory; but, in general, support this decision. *Hunt v. Berkeley*, 1 Eq. Abr. 243, but better reported in Mosely, 47, was in favor of the executors; and, though that case was disapproved by Lord Hardwicke, in *Owen v. Owen*, 1 Atk. 494, yet he there determined on the ground that the nieces were to take as tenants in common. In the Bishop of *Cloyne v. Young*, 2 Vesey, 91, (4) there *was a resid- [*30] uary clause, though no name of the legatee; and Lord Hard-

(2) R. L. 1750, B. fol. 495. As to which, vide Supplement to Ves. sen. 317, 318.

(3) Not so; but without costs. Vide Supplement to Ves. 317, 318.

(4) See the Editor's observations on this case, Supplement to Vesey, 285.

wicke thought, from the circumstances, the executors were not entitled; he cited *Holderness v. Reyner*. In *Dawson v. Dalton*, 11th February, 1752, J. Brice gave a residue to his three sons, whom he had made executors: one of them, Nicholas, died; the next of kin claimed: Lord Chancellor doubted whether it was settled, when the residue was given, by a residuary clause, to persons as tenants in common, and not as executors. In *Man v. Man*, 2 Strange, 905, the residue was given in shares; two of the shares lapsed, and they were taken, by the wife, as executrix. In *Page v. Page*, 2 Williams, 489, it was decided, that the sixth part of the residue, which lapsed, should go to the next of kin; but that was because the residue was given to them all, as a residuary clause; and they were to take nothing as executors. *Owen v. Owen*, 1 Atkyns, 494, was decided on the same reasoning.

LORD CHANCELLOR. I take it to be clear, that though executors take beneficially, as well as nominally, where there is nothing in the will to the contrary; (b) yet, if there is anything to show an intent that they were intended as trustees it will make them so. And wherever the testator has, by the same instrument by which he appoints them executors, given everything away from them to a stranger, that must show he meant them only to take as trustees. Here, he meant Jenny Powel to take beneficially; and if she had come to claim, there could have been no doubt [but that she was entitled to everything as residuary legatee. (5) (c)]

Decree for plaintiff.

(5) Mr. Cox's MS. note.

(b) But see notes to *Dean v. Dalton*, 2 Bro. C. C. 634, 636; *Batteley v. Windle*, ib. 31. See also notes to the cases cited in note (1) ante, p. 28, in 1 vol. Bro. C. C.
(c) 2 Williams, Ex. Pt. 3, Bk. 3, ch. 5, § 2, p. 903; 2 Story, Eq. Jur. ch. 33, § 1208, and notes.

CROSS v. HUDSON. Lincoln's-Inn-Hall, [7th,] 9th, 10th Dec.

(Reg. Lib. 1789. A. fol. 223. b.)

A person having a power, by marriage-articles, to charge an estate of which he was tenant for life with intermediate remainders, with a contingent fee to himself, executes the power by will; the contingent fee afterwards comes to him; though, by the accession of the fee, the power is gone; yet the provision made by the will shall be served out of his estate in fee. (1)

By indentures of lease and release 9th and 10th February, 1769, made between Catherine Wild, of the 1st part, John Hay, of the 2d part, and Richard Hay and Lionel Lee, of the 3d part, reciting an intended marriage between the said John Hay, and Catherine Wild, the said Catherine Wild conveyed her undivided moiety of the premises therein mentioned to Richard Hay and Lionel Lee, and their heirs, to the use of [31] John Hay for life, remainder to the use of Catherine for *life, remainder to Richard Hay and Lionel Lee, to preserve, &c., re-

(1) The principle upon which this case was decided has been overruled upon the most mature consideration, and numerous authorities, of some of the greatest Judges. Vide per Lord Eldon C. upon the appeal in *Maundrell v. Maundrell*, 10 Ves. 246, 254, 263, &c. And it seems now quite settled, contrary to the principal case, and *Goodhill v. Brigham*, 1 Bos. & Pull. 192, that a power will not merge and may well subsist in the person who is, or who becomes, the owner of the fees. See further, Mr. Sugden's most able exposition of the subject in his work on Powers, from p. 78 to p. 91, *passim*. It is rather singular, that the principal case seems not to have been adverted to in the case of *Maundrell v. Maundrell*.

mainder to the use of all the children of the marriage, in such shares as John Hay and Catherine Wild should appoint; in default of appointment, to all the children of the marriage equally in tail; remainder, to the use of the survivor of the said John Hay and Catherine Wild, and the heirs and assigns of such survivor. — In the said indenture was the following proviso; “that it should and might be lawful for the said John Hay, by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, to be signed by him in the presence of, and attested by, three or more credible witnesses, to grant, limit, and appoint, unto any person or persons, either for his, her, or their life or lives, or for any greater estate or estates, any rent or rents, or annual sum or sums, not exceeding, in the whole, the yearly rent, or annual sum, of 100*l.*, tax-free, and without any deduction, to be issuing out of, and chargeable upon, the said moiety, or half-part of and in the said messuages, lands, tenements, or any of them, and to be paid at such days and times, and with such powers and remedies for recovering such rent or rents, or annual sum or sums, when in arrear, as to the said John Hay should seem meet; so that such rent or rents, or annual sum or sums to be so granted, limited, or appointed as aforesaid, or any of them, should not commence or take place during his life.”

The marriage took effect; and John Hay, in the lifetime of Catherine, but there being no issue of the marriage, made his will, dated 24th May, 1775, which was published in the presence of three witnesses, and thereby (after taking notice of the said indenture) he did, by virtue and in pursuance and execution of the power to him reserved, and by virtue of all other powers and authorities vested in him, grant, limit, and appoint, from and immediately after his decease, unto the defendant Thomas Fulling, his heirs and assigns forever, one rent or annual sum of 100*l.*, free from deductions, to be issuing out of, and chargeable upon, the premises by the said deed of settlement conveyed, and to be payable out of the same, half-yearly, at Lady-day and Michaelmas in every year, the first half-yearly payment to be made on such of these days as should first happen after his decease, with *the usual powers of [*32] distress in case of non-payment: and the said John Hay declared that the same was granted, limited, and appointed to the said Thomas Fulling, upon various trusts which never took effect, and, afterwards, upon trust that the said Thomas Fulling should sell and dispose of the said annual sum; and, in the first place, pay thereout to his niece, E. M. Cross, 100*l.*, and the residue of the moneys arising by such sale, among the children of his brother Richard Hay, or such one or more of them as his brother Richard should appoint; in default of appointment, among such of them as should be living at the death of the said Richard Hay equally.

Catherine Hay afterwards died in the lifetime of the said John Hay, without issue; so that the remainder in fee became vested in John Hay.

John Hay died in November, 1781, leaving the will which he had before made unaltered and unrevoked, and leaving Richard Hay his brother and heir-at-law.

Richard Hay died, having made his will, which contained nothing material to the question in this cause, leaving four children, of whom R. J. Hay was his eldest son and heir-at-law.

A bill was filed by the younger children of Richard Hay against R. J.

Hay, and the trustees of John Hay's will, praying, amongst other things, that the will of John Hay might be established, as far as the same related to the disposal of the said annuity of 100*l.*, and that the said annuity might be sold, and the moneys to arise by the sale applied according to the directions of the will of the said John Hay.

The defendants put in their answer; and R. J. Hay, by his answer, insisted that the plaintiff's annuity was not a subsisting charge upon the estate contained in the settlement; inasmuch as the said John Hay, before his death, became entitled to an estate in fee-simple in the estate comprised in the said settlement; and that, becoming so seised, the power given to him by the settlement became merged in the fee-simple.

The cause came on now to be heard.

[*33] *Mr. Mansfield, Mr. Mitford, and Mr. Campbell, for the plaintiffs, made two questions :

1st. Whether the power was well executed, or it was extinguished by the accession of the fee.

2d. Whether the provision should be made good out of the fee.

As to the first, this is not the case of a power merged in a greater estate, from the estates being inconsistent with each other; the power being, in this case, distinct from the estate for life, which he took under the settlement, and will subsist unless some act has happened which the law says ought to destroy it. The doctrine of merger is little favored at law, but much less in this Court, and the power being in gross and collateral to the estate, does not fall within any of the cases of merger by the accession of a greater estate. Where the remainder in fee arises from the same instrument as the power, it is never said to merge the power, and although the estate for life might merge in the fee, for other purposes, the power would not be extinguished. *Powel v. Morgan*, 2 Vern. 90; *Thomas v. Keymish*, 2 Vern. 348; *Duke of Chandos v. Talbot*, 2 Williams, 601, 604. (2)

But, suppose the power to be extinguished, the provision must be served out of the interest J. Hay had in the estate. The Court will not suffer the provision to fail, though it does not arise out of the fund he meant it to arise from. Sir Edward Clark's case, 6 Coke, 18. a.

Mr. Solicitor-General, for the defendants, insisted that the contingent estate having in this case fallen in, and no act having been done by the testator afterwards, the power is not well executed. All the cases are of persons who, though they could dispose of the charge, yet, being infants, cannot dispose of the estates. That the intention of the party, here, being to execute his power by charging the wife surviving, or the issue of the marriage, and not to give anything out of the estate itself, it could not be extended to the case of there being no issue, and himself surviving; nor did it follow that, because he meant to make a charge in that

[*34] way, he would have made the same *charge out of his own estate.

It is true, that if he had stated the case, and said that, out of the power, or the contingent fee, he made the provision, it must have been allowed to be good, since the case of *Perry v. Jones*, 3 Term Reports, 88: though, before that case, Mr. Fearne thought such an interest was not devisable. If, therefore, it is made out that he meant to execute it as a power, and that he did not mean to give it as an interest, it will not be an

(2) See Mr. Sugden's extensive review of the cases, and very luminous statement of the doctrine as now settled agreeably to this argument, in his valuable work on Powers, p. 78 to p. 92, and vide note (1) antea.

exception to the rule that, when the power is extinguished by the accession of the fee, the provision fails: it has never been held that a power was well executed where the party had a reversion, after intermediate interests, where that power is collateral to the estate; and wherever the estate to be raised by the power is not to commence till after the estate in the person having it, such power is collateral, and will not pass by *totum statum suum*. If the power be executed by deed, and the commencement of the estate be immediate, it may be good; because then, by possibility, there might be an interest which would last as long in the party having the power as the estate to be created by it. Thus in *Edwards v. Slater, Hardress*, 410, where Lord Hale, in his argument, assimilates other powers to those of leasing, the effect of his reasoning is, that the rent is not gone at the death of a man, because, by possibility, his estate for life may last as long as the lease. Here, the reversion falling in destroys the power; because the whole estate comes to the same person, and there is no possibility that the intermediate estates should last as long as that to arise from the power.

Mr. *Graham*, on the same side. Under the circumstances of this case the power is gone by the accession of the fee; and the words cannot have such an effect as to raise an estate out of the testator's interest. As to the first, it is clearly within the cases of merger: where the rights are different, it is true it is no merger, as the case of a feoffment by a lord to a copyholder, to the use of another; or to a tenant to the precipe to suffer a recovery; these are not mergers: but wherever a less estate and a larger coincide in the same person a merger takes place; (3) as an estate *pour autre vie* will merge in an estate for the party's own life, and a base fee in an absolute fee. To apply this—In the case cited from *Hardress*, Lord Hale seems to think such a power as this a power in gross; if to be so considered, it is not more favorable to the plaintiff; but *it [*35] is a power coupled with an interest, as he might have conveyed it to his own family, or for payment of his own debts. In *Hearle v. Greenbank*, 1 Vesey, 298, such a power is considered as coupled with an interest. In late cases, such powers have been literally construed. In *Zouch v. Woolston*, 2 Burr. 1136, Lord Mansfield gives his idea of powers coupled with interest. In this case it was the estate of the wife, who gives to the husband a power which is a mode of property or interest in the land; the same person cannot have a partial ownership, and an absolute dominion, the interest being of the same kind, and only inferior in degree. (4) It was competent to him, at his death, to appoint the whole estate; therefore he could not exercise a partial power over it.

Lord CHANCELLOR. If any serious doubt remained in any party, in this case, I would take time to look more particularly into the cases: but it seems to me that the disposition made by the testator, in this case, must take effect out of his interest; though the power is gone.

I think, with the defendants, that the power is merged; but I am also of opinion that, though the power was gone, and the will made by him purported to be an execution of the power; yet, as he evidently meant that

(3) Lord Thurlow expressly decided upon this argument; but his determination is wholly at variance with the latest, as well as various important former, authorities. Vide Sugden on Powers, 78 to 92, especially p. 87.

(4) "Lord Thurlow, in delivering judgment, adopted these arguments; but the principle of his Lordship's decision was overruled by Lord Eldon's judgment on the appeal in *Maundrell v. Maundrell*." Vide Sugden on Powers, 87, and the preceding notes of the Editor. < See Sugden on Powers (4th Eng. ed.), 81-96. The whole of Mr. Sugden's observations upon this subject are worthy of careful consideration 4 Kent (6th Am. ed.), 343, 349, 51, 52. >

the charge should take place on the estate, at all events, it must be sustained as a charge on the estate out of the interest he had at his death. This case is not at all like *Tomlinson v. Dighton* (1 Williams, 149). There the question was, whether a conveyance, as by the owner of the estate, should operate as an execution of the power which the wife clearly had, but no ownership; and it was held it should. Here the will refers to the power; and, though it goes on with some words more general, as to "all powers and authorities enabling me thereto," yet, to be sure, technically speaking, the power does not apply to the sort of interest which ownership gives. But the testator, in this case, has charged the estate with a burden which his interest enabled him to lay on the estate; though his power, properly speaking, was gone. When I speak of his power, I mean at the time of his death, for that is the period at which the will speaks. And, therefore, it is the case of a man having no power, but having an interest enabling him to charge the estate, and charging it in the [36] shape of an execution *of a power notwithstanding; now I never heard it as a point to be maintained, that because a man shows an intention to execute a power which he has not, the interest which he had in the estate should not bear out the disposition he thinks proper to make of a charge on that estate. Therefore, though the power in this case were merged, which I take it to have been, yet the devise must take effect out of his interest.

DUNGEY v. ANGOVE and Others.

[Vide sequel of S. C. 2 Ves. jun. 304.] Lincoln's-Inn-Hall, 12th Dec.

(Reg. Lib. 1789. A. fol. 43. b.)

Upon an interpleading bill, quære, whether the money ought not to be actually brought into Court before the motion for an injunction; though the practice seems to have been, that it was time enough if brought in upon showing cause against the motion to dissolve the injunction. (1)

THIS was a bill of interpleader, filed by a tenant, against persons who claimed the premises under different rights; offering, as usual, to bring the money into Court to abide the event, and an injunction had been obtained till the coming in of the answer.

(1) Sir John Leach, Vice Chancellor, having often observed, that parties keeping money in their hands were guilty of great delay, and at the last made themselves safe by the facility, under the former practice, of obtaining an injunction at any time, upon paying the sum into Court, endeavored to remedy this mischief, in 1818. His Honor determined, in *Croggon v. Symons* (3 Madd. Rep. 130), after a conference with Lord Eldon C., that an injunction to stay proceedings at law in an interpleading suit, was upon the same principle as an injunction in any other suit; and that a plaintiff could only apply for the object upon the merits disclosed in the answer, if he were not in a situation to obtain an injunction as of course, upon an attachment, an order for time, &c.

It seems that Lord Eldon C. rather differed afterwards from this, upon reflection: but in a subsequent and very late case, Sir J. Leach observed, that he still retained the impression above alluded to; though he did not mean that a plaintiff must at all events, draw up, or apply for, the order of the injunction as of course, upon an attachment, &c. It was quite sufficient, if the Court saw he was in a situation to do so. In *Silver v. Atkins*, 12th Feb. 1820, last day of Hil. T. Editor's MS. The sequel of the principal case, of *Dungey v. Angove*, will be found in 2 Ves. jun. 304, &c.; from whence it appears that the application in question arose from the most gross fraud on the part of the plaintiff, and his solicitor. And that decision established the principle, that a tenant cannot sustain a bill of interpleader between his landlord and a stranger. The case was there indeed anticipated of a landlord himself embarrassing his tenant with persons claiming under his own acts (see p. 305); and that distinction was afterwards exemplified and clearly marked in *Cowton v. Williams*, 9 Ves. 107; *Clarke v. Byne*, 13 Ves. 383, and *E. I. Co. v. Edwards*, 18 Ves. 376.

Mr. *Simeon* had moved that the bill should be dismissed, the money not having been paid into Court agreeable to the offer contained in the bill.

Mr. *Hollist* objected that the motion was premature, no notice having been given to pay in the money: that the first motion ought to be for payment of the money, and, upon non-payment, they might move to dismiss.

Lord CHANCELLOR thought that the motion for dismissal was well founded, on the non-payment of the money; and that the injunction, for want of answer, ought not to have been granted without the plaintiff's bringing the money into Court. (1) It stood over, and notice was given of motion to dissolve the injunction on the merits.

Mr. *Hollist*, in support of the injunction, and against the order of dismissal, cited two cases.

Brimer v. Buchanan, 28th November, 1780, where, in a bill of interpleader, the defendant being in America, and an injunction being obtained for want of an answer, the same was continued on bringing the money into Court.

*In *Surry v. Waltham*, 28th February, 1785, the injunction [*37] was continued to the hearing, on the plaintiff's paying the rent due into Court, and paying future rents within six weeks after they accrued.

Lord CHANCELLOR said, his opinion was, that the money ought to be paid in the first instance; because the gist of the suit is, that the plaintiff is a stakeholder; that he has the money, and wants to get rid of it. In the first case cited, of the man in America, nothing can be harder than that the plaintiff should prevent his proceeding, without bringing the money into Court which he admits to be due from him. It is laid down distinctly, both in the practical Register, p. 39, and in Equity Abr. tit. Interpleader, that no step can be taken till the money is paid into Court.

It stood over again till this day, when Lord Chancellor said, that, in a pure interpleading bill, the plaintiff never can proceed compulsorily, by injunction, till he has brought the money into Court. (a)

But the defendant waiving this motion to dismiss the bill, (2) the injunction was continued (by consent), on the plaintiff's bringing into Court the year's rent due at Christmas, 1788, and the three quarters due at Michaelmas last (it being admitted that the reservation of rent was quarterly); and also all the costs at law, both of the replevin and action of covenant, and undertaking to pay the future rents within six weeks after each rent-day. (3) (b)

(1) See note (1) on the preceding page.

(2) Lord Loughborough C. observed, in the future stage of the case upon this, that he did not blame the plaintiff for this consent. It might either be a matter of prudence, or occasioned by his distress. Vide 2 Ves. jun. 311.

(3) See the ultimate result of this case, 2 Ves. jun. 304 to 313.

(a) Eden on Injunct. (2d Am. ed.) 403, 404; 1 Smith, Ch. Pr. (Am. ed.) 473, 474; 1 Madd. Ch. Pr. (4th Am. ed.) 175; Story, Eq. Pl. ch. 6, § 291; 2 Story, Eq. Jur. ch. 20, § 809; Warrington v. Wheatstone, Jacob, 202; Atkinson v. Manks, 1 Cowen, 703, 704; Shaw v. Carter, 8 Paige, 339; Biggs v. Kouns, 7 Dana, 410; Pauli v. Von Melle, 8 Sim. 327; Clindennin v. O'Keefe, 1 Hogan, 118; Spring v. S. C. Ins. Co., 8 Wheat. 268.

(b) See Eden on Injunct. (2d Am. ed.) 398, 399. For more, upon the subject of Interpleader, see Aldrich v. Thompson, 2 Bro. C. C. 149; Bolton v. Williams, 4 Bro. C. C. 297.

LEE v. ALSTON.

Lincoln's-Inn-Hall, 15th Dec. [S. C. 1 Ves. jun. 78, *Quod vide.*]

(Reg. Lib. 1789. B. fol. 91. b.)

The money raised by the sale of timber, cut by tenant for life, impeachable, &c. ordered to be paid to the next taker of the inheritance, though there were intermediate remainders that might arise. (1) Such tenant cutting timber will lead to an account, but where no more timber has been cut than charged by the bill, and admitted by the answer, the money shall be paid without costs.

THIS cause, reported ante, vol. i. p. 194, came on again upon the Master's report.

The Master reported, that the timber cut had sold for 665*l*.

And the question was, whether Mrs. Lee, as entitled to the inheritance in tail, though with intermediate remainders which might arise, was entitled to the money.

[*38] *Mr. Mansfield, and Mr. Lloyd, insisted, that, under the cases of *Udall v. Udall*, Aleyn, 81, and *Bewick v. Whitfield*, 3 Wms. 267, it had been always held that the first taker of the inheritance was entitled to timber fallen by storm, or by the act of the party. That in *Grath v. Cotton*, [1 Ves. 524, 546,] 3 Atk. 751, it was held otherwise, on account of the collusion; and in *Williams v. Duke of Bolton* (stated in Mr. Cox's note on 3 Wms. 268), it was on account of the duke himself, who cut the timber, being entitled to the inheritance. In this case, Sir Rowland Alston had no right to lay out the money upon the inclosure; he ought to have charged the estate agreeably to the act of Parliament.

Mr. Solicitor-General, and Mr. Selwyn, for Sir Rowland Alston, principally argued that this was not a case for costs, the Master not having found any timber cut but what was stated in the bill, and admitted by the answer.

LORD CHANCELLOR said he continued of the opinion he was of, that if a party cuts timber on an estate on which he is not entitled so to do, it will draw an account (a) that he must suffer himself to be considered as the bailiff of the remainder-man; on the other hand, the remainder-man must take the money he got for it; whereas, in an action, he might have the real value of the timber.

He admitted that the case of *Bewick v. Whitfield* had settled the law on the point of timber fallen by tempest, (b) &c., and ordered the money to be paid to the plaintiff, but without costs.

(1) Vide S. C. in its former stage, ante, 1 vol. 194, and the more full report of the present argument, &c. 1 Ves. jun. 78, &c. See also *Gower v. Eyre*, Cooper, Ca. Ch. 156, &c.

(a) See Eden on Injunct. (2d Am. ed.) ch. 10, p. 244 - 249. See also the notes to this case in 1 Bro. C. C. 195, 196.

(b) See Eden on Injunct. (2d Am. ed.) 251, et seq.

WILLIAMS v. FARRINGTON.

Lincoln's-Inn-Hall, 15th Dec. [S. C. 2 Cox, 202.]

(Reg. Lib. 1789. A. fol. 44. b.)

If bill be for discovery of matters penal at common law, or by statute, the defendant need not demur or plead, but it will be admitted on exceptions; (1) but when the time for suing a penalty expires between the first and second answers, and exception is taken to the second answers, and exception is taken to the second answer for not discovering, the exceptions shall be allowed, and the party is bound to discover. (2)

BILL by the husband of the Coote, East Indiaman, on the part of the owners, against the captain, praying an account of goods put on board by him, or for his account, in the course of the outward and homeward-bound voyage, beyond his privilege allowed by the company, in order to ascertain freight due to the owners.

*An answer had been put in, to which exceptions had been [*39] taken. The defendant submitted, and put in a further answer, except as to so much as interrogated with respect to the cargo put on board the vessel beyond her privilege, insisting he was not bound to answer as to that, as it would subject him to penalties both to the king and the company, but not setting forth the penalties or the statutes inflicting them.

At the time of putting in the first answer, the time limited for suing the penalties to the crown was not elapsed, but it was at the time of the second answer put in; and, exceptions having been taken to the second answer, the Master reported it sufficient; exceptions were taken to the Master's report, which came on now.

Mr. Attorney-General, and Mr. Abbot, contended, that the answer, in this case, was not sufficient. That, even in the cases where a defendant may plead or demur, if he chooses to answer, he must put in a full answer. Here he refuses to set forth what cargoes he put on board, lest he should be liable to penalties; but he does not state what those penalties are, whether they are by statute, or only by contract, which is not sufficient; as, in order to afford the excuse, they must be penalties by operation of law. In *Honeywood v. Selwin*, 3 Atk. 276, some specific penalties are pointed out.

2dly. The limitation of the penalty, though it had not expired at the end of the first answer, had at the time of the second; so that the defendant was not then liable to any penalty upon making the discovery.

Mr. Solicitor-General, for the defendant, said he had always understood that where a party submitted to exceptions, he was not supposed to submit to all that were taken, but that he only put in an answer to such of them as, with his former answer, made a full answer.

The second answer, having reference to the first, and making with it one answer, if he was not liable, at the time the first was put in, to answer a particular interrogatory in the bill, he *could not become [*40] so afterwards. And the Master, in this case, has reported the answer sufficient to a common intent.

The bill, here, is by the husband of the ship, on behalf of the owners, and claims, on their behalf, freight upon the captain's investments beyond

(1) See Mr. Beames's Elem. Pleas, 270, 271, and the cases in note 1, *ibid*.

(2) Vide *Chetwynd v. Lindon*, 2 Ves. 450; *Parkhurst v. Lowten*, 1 Meriv. 391, and *Beames's El. Pl.* 270, 271.

his privilege; which it cannot be necessary for the defendant to answer, because the freight cannot be due to the plaintiff, or the owners, the whole ship being freighted to the company. The captain is therefore only liable to the company, to whom the captain enters into very heavy securities not to exceed their privilege. The bill is, therefore, merely to render the defendant liable to these penalties. In order to be supported, a bill ought to show that the plaintiffs have an interest in the subject.

Mr. *Mitford*, as *amicus curiæ*, mentioned a case of *Mason v. Murray*, which was a bill for an account of the sale of a book, the defendant having demurred on account of penalties, (3) the bill was amended, waiving the penalties; but the defendant insisted he still was not liable, as the king's share could not be waived; but, in the mean time, the limitation having expired, and exceptions being taken to the second answer on that account, Master *Pechel* allowed the exceptions, and no exception was taken to his report.

Lord CHANCELLOR thought where a bill tended to charge a defendant with a crime, and make him liable to a penalty, if the crime or penalty is created by the common or statute law, the defendant need not plead or demur to it, but, upon exceptions to the answer, he might insist he was not liable. (a)

But the time for suing the penalty being expired, at the time of the second answer being put in, he thought the defendant liable to answer, as far as the penalties to the crown extended. (b)

Exceptions to the Master's report allowed.

(3) See *Hudson v. Davis*, 2 Anstr. 504.

(a) See, as to the right of defendant to object to discovery in a matter tending to criminate him, or expose him to penalties, &c., *Glynn v. Houston*, 1 Keen, 329; *United States v. Twenty-Eight Packages*, Gilpin, 306; *Bishop of London v. Fytche*, 1 Bro. C. C. 97, and note; *Wigram on Discovery*, Prop. 2 (1st Am. ed.), 82, et seq.; 2 Story, Eq. Jur. ch. 42, § 1494, and note, and numerous cases cited; Story, Eq. Pl. ch. 11, § 575-598. See also, as to the answer of the defendant to a bill of discovery, *Cookson v. Ellison*, 2 Bro. C. C. 252, and notes.

(b) *Wigram on Discovery*, Prop. 2 (1st Am. ed.), 85; *Corp. of Trin. House v. Burge*, 2 Sim. 411; *Davis v. Reid*, 5 Sim. 443; Story, Eq. Pl. ch. 11, § 598.

[*41] *Earl of LONSDALE, and Others, v. CHURCH and Another.

Rolls, [23d Nov.] 17th Dec. [1769, & 16th Feb. 1790.]

(Reg. Lib. 1789. A. fol. 241.)

A receiver of a public trust (having a salary) making interest of balances in his hands, is accountable to the trustees for interest made *ultra* (1) his salary [notwithstanding prior accounts settled without demanding it.] (2)

BILL by the trustees for repairing, &c. the harbor of Whitehaven, against the late receiver and treasurer of the duties thereof, and his surety, for an account of sums of money received and disbursed, and of interest received on balances, from time to time, in his hands.

(1) The M. R., speaking of this decision about four years afterwards, observed, "it was a very hard case. It was meant that the man should have interest when they first employed him; but, being a public officer, making use of public money out at interest, he thought his employer had a right to that interest improperly made." Vide in *Massey v. Davies*, 2 Ves. jun. 320.

(2) From Lord Colchester's MSS. and Reg. Lib.

The case upon the bill, answer, and evidence, appeared to be as follows:

By Anne, the trustees, for the time being, or eleven or more of them, were authorized to appoint, by writing, a collector or collectors of the duties, &c. for repairing the harbor; and the sums received by him, or them, were to be paid over to a receiver or receivers, to be appointed by the said trustees; and it was enacted that the trustees should take, of the collectors and receivers, sufficient security for duly collecting the duties, and accounting for the same; and the collectors and receivers were to be allowed for their pains in the office, as much as the trustees should think proper, not exceeding, for all together, 12*d.* in the pound.

In 1782, the defendant Church was appointed, by the trustees, clerk and receiver, at a salary of 60*l.* per annum, in the room of Spedding, who had acted, not only in that capacity, but also as treasurer; and Spedding having, at that time, a sum of 162*2*l.** 16*s.* 3*d.* in his hands, the same was, by the direction of the trustees, paid into the hands of the plaintiff Dixon (one of them) as a banker, into whose hands the defendant Church was directed to pay the surplus moneys in his hands from time to time; and, in consequence of his appointment, the defendant Church, with the defendant Benn, as his surety, entered into a bond, in the penalty of 1000*l.*, for the due receipt of the duties, to make regular payments to the tradesmen, of the harbor, and to give a fair account of his receipts and disbursements, and pay the balance thereof to the trustees, or as they should appoint.

*The defendant received the duties, and passed his accounts [*42] yearly till 1804, when he was appointed treasurer as well as receiver, and the sum of 2041*l.* 11*s.* 3*d.*, then in the hands of Dixon, was paid over to him as treasurer: and upon passing his accounts in 1785, there appeared to be in his hands (inclusive of the money received from Dixon) a balance of 2071*l.* 7*s.* 8*d.*, and he was then requested to give a further security, which he did, by entering into a bond, with the said Benn as his surety, in the penalty of 3000*l.* for the execution of the said appointment. And, again, in 1787, the balance in his hands being further increased, he, with the same surety, entered into a third bond of the trustees.

About the 26th February, 1788, the plaintiffs removed the defendant Church from his said appointments.

The defendant, by his answer, admitted that, during the execution of the said appointments, he placed out several sums of money, being part of the balances in his hands, from time to time, on securities, at interest, which interest was received and disposed of by him for his own use; and said he conceived he had a right so to do, not having been called upon by the trustees to pay the same.

In March, 1788, three several actions were brought on the bonds, and the defendant Church held to bail thereon; and, afterwards, the present bill was filed for an account of the balances, from time to time in defendant Church's hands, and the interest made thereon, and praying that the securities should be assigned to the plaintiffs.

The cause was heard last term.

Mr. *Mitford*, Mr. *Graham*, and Mr. *Boulton*, for the plaintiffs. The plaintiffs only call upon the defendant to answer interest as far as he has made it. It is a point of equity, that, where a man makes interest of the money of another, he shall pay the interest he so makes of it. The defendant had a salary of 60*l.*; might have left the money dead, and he would not be answerable for interest; but where he makes it, whether

in the character of trustee, executor, or, otherwise, he must pay the [*43] interest, 1 P. Williams, 140; **Ratcliffe v. Graves*, 1 Vern. 197;

Lee v. Lee, 2 Vern. 548; *Hicks v. Hicks*, 3 Atk. 274; *Newton v. Bennet* (ante, vol. i. p. 359); *Perkins v. Baynton* (ibid p. 375); *Treves v. Townshend* (ibid. p. 384); *Forster v. Forster* (ante, vol. ii. p. 616); *Bates v. King* (30th Oct. 1789). This case is very different from that of a banker; because, in that case, no one can be deceived; as he knows, by the course of the trade, he is to receive no interest.

Mr. *Solicitor-General*, Mr. *Lloyd*, and Mr. *Romilly*, for the defendants. Under the acts of Parliament, the trusts are to be executed by not less than 24 trustees: here are but 21 trustees, plaintiffs, and one defendant. For anything that appears on the record, the trustees, to whom the bonds were given, may still be trustees. Unless the plaintiffs had deduced a title to sue under the bond, they have not made such a case as will authorize the Court to make a decree. It is true, the defendant has submitted to an account; but if they refuse to take the account, in the manner in which he offers to give it, he is not bound by the submission.

The case of *Forster v. Forster*, was not that a receiver should pay interest which he had made, for, in fact, he had not made any; but that, not having paid the money as he ought, according to the order appointing him receiver, he should account for the same. The other cases are of persons invested with the character of trustees, and if they make interest, they undoubtedly must pay it. We admit, if the defendant is a trustee, he must pay the interest made; but if the trustees gave an express authority to make interest, they shall not call upon him for that interest; and there is sufficient evidence, in this case, for a court of law to presume there was a contract, between the parties, that the defendant should not pay interest.

Mr. *Mitford*, in reply, insisted, that being a public officer, the defendant was a trustee for the public.

This day his Honor gave judgment, (3) and, after stating the case as it is before stated, spoke to the following effect :

(3) The Editor having been favored with Lord Colchester's notes of the judgment on this occasion, has the satisfaction of subjoining them. "His Honor, after stating the introductory part of the case, proceeded thus:—In 1782, Church was appointed collector; afterwards he was appointed to the additional office of receiver. From that time he has regularly passed his accounts every year, and the balance in his hands was every year increased; but he was never called on to pay the balance in his hands on settling the account.

"In 1788, he was called on to pay the balance, but the money then was not forthcoming; the money was then placed out by him at interest: he could not immediately get it in; and that being the case, it seems impossible to say that he should not be charged with interest for the money which he so kept in his hands.

"Defendant contends that he is entitled to make interest, and that the trustees knew that he made interest, and did not object to it.

"This is not the case of a person dealing with his own steward; if it was, I should think he would not be liable to pay interest.

"If these trustees had been persons dealing with the defendant as their own agent, and for their own benefit, I think the account they have settled would preclude them from demanding interest; but this is a very different case.

"The trustees here are trustees for the public, (†) and the legislature has said, the receiver shall be paid a salary amounting to more than one shilling in the pound.

"If the trustees might enable the receiver to make interest, it would tend to the most mischievous consequences. In defiance of the act of Parliament, they might give the receiver a salary much larger than the statute prescribes, and might enable him to employ, for his own benefit, money which ought to be applied for the benefit of the public. It would be a great

(†) See *Fairtile d. Mytton v. Gilbert*, 2 T. Rep. 169. But, nevertheless, trustees under a public act are not stopped by their own deed from insisting that the act gives them no such power as they have exercised. Vide *ibid*.

The question is, whether the receiver is not liable to account for the interest made of the money in his hands.

*The first objection taken, is, that the plaintiffs have no right to [*44] call upon him; but it does not appear who could have a right, if the present plaintiffs have not. No such objection is raised by his answer, in which he admits the right, and submits (in case the Court shall think proper) to pay interest for the balances in his hands. I am, therefore, of opinion that he is estopped by his answer, from this objection; and it seems to me that the plaintiffs are persons who have a right to call upon him for the account.

Then the question is, whether, from the nature of the office, he is not accountable for interest. The present may be thought a hard case; (4) but the only question is, whether, in a court of equity, he may not be called upon.

This is not a case (like that of Lord *Salisbury v. Wilkins*) (5) of a person dealing with his own servant, who clearly would not have a right to call upon him; (5) for if a gentleman will permit his steward to make use of the money in his hands, he certainly shall not call upon him for the intermediate interest. So if these persons had been dealing with the clerk on the subject of their own money, and settled accounts with him, they would be bound by those settlements. But that is not the case here: his trust was for the public, to exact duties from all persons coming into the harbor; for which receipt he was to be paid at the rate of 1s. in the pound. Then it is said, that the trustees, though concerned for the public, may permit him to make interest till he is called upon to account for it; but the mischief to result from this would be very great: it might put it out of the power of the person who has such moneys in his hands to answer the public exigencies, and might give him public money in such a way that the public could not have the use of it. This cannot be shown more strongly than by the present case; for, when called upon to account and pay his balance, the receiver could not answer that call, because the money was out at interest. Then he objects that he was never called upon till the time of his discharge: — the question has nothing to do with the notice, but whether he had a right to use the money, and make interest of public property. The legislature, when they gave him 1s. in the pound (or possibly two, if he united both offices, as it seems doubtful whether the trustees might not allow 1s. as collector, *and 1s. as receiver), could not mean that he should make interest [*45] I think, therefore, in order to the example, he ought to account for the interest. Not being accountable for interest would be a temptation to receivers not to be ready to pay money due from them when demanded.

temptation to the receiver not to pay the money in his hands at the time he ought, if he might make interest of it.

“Upon this principle it is, that a receiver appointed by this Court, who does not pay the money in his hands, is bound to pay interest for it.

“I think the receiver ought not to have made interest of it: that it is injurious to the public, and of very pernicious example, that a man in execution of a public office should place the money in his hands in such a situation that he cannot command it when it may be wanted.”

N. B. Defendant was also a trustee, but this circumstance does not seem to have been noticed or relied upon on either side.

(4) See also 2 Ves. jun. 320.

(5) *Earl of Salisbury v. Wilkinson*. Vide in Lord *Chedworth v. Edwards*, 8 Ves. 48, &c., which shows this part of the report to be inaccurate. The reason why Mr. *Wilkinson* was not held liable, was, because the plaintiff had desired him to keep large sums in his hands; and not merely because he was his servant. As to cases of fraud, &c., between principals and their stewards, agents, &c., see Lord *Chedworth v. Edwards*, 8 Ves. 56; *Beaumont v. Boulbee*, 5 Ves. 488, and 7 Ves. 599, &c.; *E. Hardwicke v. Vernon*, 14 Ves. 504.

It is a settled rule of the Court, that such a receiver shall pay in his balance every year; and, if he keeps the money in his hands, he is answerable for interest. He is bound by his bond to have the money ready when called upon. If, therefore, he has made interest, he has done it contrary to the intent of the legislature, and the duty he owes to the public; and, therefore, he must answer for the interest he made, notwithstanding the trustees may have been negligent in not calling for it sooner; for, as his trust was to have the money ready when called upon, he must make it good for so much as he has received above his salary. (a)

This decree was affirmed, as to the principal point, upon a rehearing, in the Sittings, at the Rolls, after Hilary term, 1790. (6)

(6) "The case was reargued on the 16th Feb. 1790, upon the question, whether the trustees having agreed to allow the defendant to make interest, they should not now allow him at least 1s. in the pound, being to the extent permitted by the act of Parliament. But his Honor was of opinion, that if the trustees had made such an agreement, they had acted beyond their power; and therefore refused to sanction such allowance." From Lord Colchester's MSS. It appears from Reg. Lib. "that an inquiry was directed as to the fact of his having placed the money out at interest. If he had done so, he was to account for the interest, profit, or advantage made thereof." — R. L.

(a) See the cases cited in the notes to *Newton v. Bennet*, 1 Bro. C. C. 361, 362.

FOX *v.* MACKRETH. Lincoln's-Inn-Hall, 16th Dec.

(No Entry.)

The Court will not order a balance, upon charge and discharge in the Master's office, to be paid in, before the Master has made his report, even upon his certificate of the sum. (1)

UPON taking the account decreed in this cause before the Master, the defendant admitted a certain charge, and claimed allowances by way of discharge, leaving a certain balance due from him. The Master had not made his report, but certified the state of the account. *Mr. Solicitor-General* moved, this day, that the defendant might pay in the balance,

(1) The MS. notes of Mr. Cox intimate, that the Court had, even before this case, made such orders in many cases, upon the party's examination in the Master's office, previously to the actual report; amongst which Mr. Cox mentions *Letch v. Stevens*, as having been cited in the principal case. The notes then state, that Lord Thurlow felt inclined to make such an order in *Forest v. Timms*, Hil. 1791; but did so for the first time in *Thompson v. Pyefinch*, 10 March, 1791, which is cited in the third edition of Mr. Brown's Reports, annexed to the principal case. (†) The existing practice, and its former history, will, in addition to the above, be clearly seen in the observations of Lord Eldon C., in *Quarrel v. Beckford*, 14 Ves. 178. His Lordship there says, "I remember where, for the purpose of getting money paid into Court by the defendant, it must have appeared upon his answer, that the money was due. When the attempt was made to extend that, by a motion for payment into Court of money stated to be due, by the examination of the defendant in the Master's office, Lord Thurlow, having in some instances refused, was at last prevailed on, with great doubt, to grant it; but upon this solid ground, that if it appears as clear upon that examination, looking to the rights and interests of the party, that money is due from him, as in the other case upon the answer, there is no reason against granting the application in the one case as well as the other. The next attempt was where, to avoid the principle, so extended to the examination, the party did not cast up his schedule; and to that length, after considerable hesitation, the practice has arrived, and is now at least uniform; but the result must be clearly verified by affidavit; collecting clearly the result of the schedule, and furnishing the sum which the one party has a right to demand, and the other is bound to pay."

(†) Lord Thurlow made a similar order a few days afterwards, upon the party's examination, without the Master's certificate. *Knevet v. Gould*, 18th March, 1791. From the MSS. communicated to the Editor by Sir John Simeon.

thus admitted by him to be due, into Court, in analogy to the practice of the Court, where a sum of money is admitted by an answer or schedule to be in the hands of the defendant, which is always ordered to be paid into Court.

The motion was opposed by Mr. *Schwyn*, who insisted there never had been such an order, till after the Master had made his report; till which time the sum due was not considered as ascertained. That, as to delays in the Master's office, there were other means of preventing them.

*Lord CHANCELLOR said, the motion was the first of the kind he [*46] ever remembered. That, where money was admitted to be in a defendant's hand, the Court would order it to be paid in, for safe custody; but here no specific sum was ascertained. (2) With respect to delays, it was frequent to apply for orders for the Master to proceed *de die in diem*, but at present he could not make the order. (a)

(2) See, however, the preceding note.

(a) See 2 Smith, Ch. Pr. (Am. ed.) 391, 392, 393; 2 Madd. Ch. Pr. (4th Am. ed.) 399; *Roberts v. Hartley*, 1 Bro. C. C. 87; *Mills v. Hanson*, 8 Ves. 68, 91.

Ex parte SMITH, in the Matter of LEWIS and POTTER. (1)

Lincoln's-Inn-Hall, 21st Dec. [Vide 2 Cox, 209, 213, & Cooke, B. L. 139, 140.]

Creditor obtaining goods from his debtor, on credit, just before he breaks, shall not prove for the residue without giving up the goods. (1)

PETITION to stay the dividend until Lovel a creditor, should account for the value of goods to the amount of 270*l.* obtained from the bankrupts, on credit, two days before they failed, and on suspicion that they were about so to do; and which he insisted on detaining as a part-payment of his debt. Lovel was since also become a bankrupt, and his assignees also insisted on a right to apply these goods as a part-payment.

Lord CHANCELLOR thought Lovel could not avail himself of this advantage, and take a dividend for the residue, if the fact should turn out as stated, and therefore directed an issue to try the fact. He said Lovel's assignees stood in the same situation with Lovel.

(1) See other points of a similar nature in the same bankruptcy, and at the same period, relative to bills of exchange, in 2 Cox, Rep. 209, 213, and Cooke, B. L. 139, 140.

Ex parte SIMPSON in the Matter of FLETCHER.

Lincoln's-Inn-Hall, 21st Dec.

Creditor admitted to prove costs taxed after the commission, on verdict obtained before. (1)

PETITION to be admitted to prove 111*l.* costs in two actions, on different policies, against the bankrupt, an underwriter; in one of which there

(1) This decision seems evidently wrong. See the cases referred to in the notes to *Ex parte* Moore, *antea*, 2 vol. 597, amongst which, vide *Ex parte* Charles, 16 Ves. 256, and 14 East, R. 197; *Johnson v. Peck*, and *Kemp v. Mackrell*, 2 Ves. 461, 466, 579.

was judgment by default, for want of a plea, and, upon a writ of inquiry, 16th August, 1779, the damages were assessed, and 40s. costs; in the other, verdict for the sum underwritten, and 40s. costs.

The commission issued November, 1780. Final judgment was suspended by an injunction-bill in the Exchequer; but, at length, the injunction being dissolved on the merits, the judgment was ^{signed} [47] 1783, and costs in both actions taxed at 111*l.* 8*s.* which the commissioners refused to admit to be proved.

Mr. *Solicitor-General*, and Mr. *Mansfield*, argued that this was a debt subsequent to the bankruptcy, commencing upon the taxation; and, therefore, could not be proved under the commission, and assimilated the present case to that 1 Atk. 140; and *Ex parte Sneaps*, 1 Cooke's Bankrupt Law, 236.

Mr. *Simeon*, in support of the petition, argued, That the case *Ex parte Sneaps* was costs for a contempt of chancery, not an action at law, and was rightly determined. The case, 1 Atk. 140, has been overruled. 2 Black. Rep. 1317; Cowp. 25, 138; 1 Wils. 141; *Langford v. Ellis*, East, 1785; 1 Cooke's Bankrupt Law, 227; *Lewis v. Piercy*, Term Rep. C. P. 29; 1 Cooke's Bankrupt Law, 508, in which bankrupts had been discharged out of execution, not only for the principal debt due before the bankruptcy, but for the costs taxed after the bankruptcy; and, though the point had never been determined in this Court, on petition, it was a necessary consequence that the creditor must be admitted to prove such costs under the commission, or otherwise the bankrupt must remain liable: the propositions are convertible. It is so on principle, for the stat. of Gloster gives the costs of the writ, which has always been considered as the costs of the whole proceeding at law, which costs had a reference to the verdict.

LORD CHANCELLOR doubted before the argument, and inclined against the petition; but, after the argument, he made the order, saying the point had been determined at law in the cases cited. Whenever the judgment is recovered, the former debt is at an end. (2) (a)

(2) But see, contra, the references in the preceding note.

(a) The doctrine upon this subject, which had departed from the old determinations, has been lately settled, upon very great consideration, and brought back to its original correctness. The first case upon the subject was *Ex parte Todd*, before Lord Northington, cited 3 Wils. 270, as having been after a verdict, and 11 Ves. 651, as after a nonsuit. The Editor has searched the book of the Secretary of Bankrupts for it, but without success. His Lordship there held, that until judgment there was no demand at law for costs: and the judgment being after the bankruptcy, there was not a debt at the date of the commission, and the costs could not be proved. In *Walter v. Sherlock*, cit. 3 Wils. 270, 272, and 11 Ves. 652, in which (though there is some confusion in the case) it appears that upon a bankruptcy between verdict and judgment, it was determined that the costs could not be proved, not only because they were unliquidated, but because there was no judgment. And by analogy to these decisions, Lord Thurlow, in the above-cited case of *Ex parte Sneaps*, held that the taxation constituted the demand.

But this sound and correct doctrine was afterwards broken in upon by the present, and the several cases above cited; to which must be added, *Hurst v. Mead*, 5 T. R. 365; *Philips v. Brown*, 6 T. R. 282; *Watts v. Hart*, 1 B. & P. 134; *Willett v. Pringle*, 2 N. R. 190.

Upon this question, however, coming on before Lord Eldon, in the case of *Ex parte Hill*, 11 Ves. 646, 2 N. R. 191, n., his Lordship, after a luminous and elaborate review of all the cases, expressed his decided approbation of the rule, as originally laid down by Lord Northington; and held, that where there was a verdict and judgment after bankruptcy, in an action previously brought, costs could not be proved. His Lordship afterwards, in the case of *Ex parte Charles*, 16 Ves. 256, where there had been a verdict for damages, and a commission issued before the judgment, held that there was not a sufficient debt to support a commission; but, as his opinion contradicted so many cases, and particularly that of *Langford v. Ellis*, his Lordship granted a case: upon which the Court of King's Bench certified against the debt, 14 East, 197. This decision has been followed by *Buss v. Gilbert*, 2 M. & S. 70, and *Walker v. Barnes*, 5 Taunt. 778; 1 Marsh. 346, and the case of *Ex parte Sneaps*, by the King v. Davis, 9 East, 318, where it was decided that the costs of a suit, directed to be paid by an award made before the bankruptcy, but which were not taxed till after, could not be proved under the commission. — *Eden*.

Ex parte CONGALTON, in the Matter of ELIZABETH TYLER.

Lincoln's-Inn-Hall, 21st Dec.

Creditor borrows money, which he afterwards repays with interest, after a secret act of bankruptcy; the loan being repaid, shall be considered as never borrowed, and he shall prove his whole debt. (1)

ELIZABETH TYLER carried on the business of a navy agent, and, as such, was employed by the petitioner. On the 11th November, 1784, by an account delivered from her, it appeared *she was [*48] debtor to the petitioner 312*l.* 1*s.* 10*d.*, which the petitioner directed her to invest for him in stock. On the 13th November, her nephew informed him the stock was bought, and a copy of a broker's note was sent him to that effect, which he imagined clear proof.

On the 20th November, 1784, the petitioner applied to Elizabeth Tyler to lend him 163*l.*, which he repaid her with 5 per cent. interest thereon, after a secret act of bankruptcy committed by her.

The petition was to be let in to prove the whole debt due from Elizabeth Tyler to the petitioner, the stock having never been bought.

It was insisted, against the petition, that the 163*l.* must be deducted from the sum to be proved, as having been paid the petitioner by Elizabeth Tyler; and that the repayment, being after a secret act of bankruptcy, was a nullity, and not protected by the statute, as it was not in the usual course of trade. The balance, therefore, must be struck, as it was at the time of the bankruptcy unvaried by the payment after it.

Lord CHANCELLOR said, it was manifest the 163*l.* was a loan, and no payment; that having been repaid, though after the secret act of bankruptcy, it was to be considered as if the money had never been lent; and ordered the petitioner to be admitted to prove his whole debt.

(1) Vide the chapter on Set-off, and Mutual Credit, in Cooke, B. L. p. 581, &c., sixth edition.

*HILARY TERM.

[*49]

30 Geo. 3. 1790.

POOLE v. RUDD [RHUDD]. [25th Jan.]

Mr. Justice Buller [Mr. Leeds, and Mr. Pepys,] for the Lord Chancellor.

(Reg. Lib. 1789. B. fol. 210. b.)

Money paid in, as earnest, at a sale of an estate, and ordered to be laid out in the funds, is part-payment of the purchase-money, and the vendor must abide by the rise or fall of the funds. (1)

THIS was a petition to set aside a contract for the purchase of an estate, which had been heard by Mr. Justice Buller, sitting for Lord

(1) Vide *D'Oyley v. Countess of Powis*, ante, 2 vol. 33, and 1 Cox, 206. Per M. R. in *Smith v. Jackson*, 1 Madd. Rep. 621, &c. { 1 Sugden, Vend. & Purch. (6th Am. ed.) 57 [78]. }

Chancellor, on the day of petitions before term. A question arose, at the hearing, whether a sum of money, paid, at the auction, was to be considered as a part of the purchase-money, and, therefore, the seller to have the benefit accruing by a rise of the fund in which it was invested, or the purchaser was to have that advantage; upon which Mr. Justice Buller took time to consider, and upon the first cause-day in the term gave judgment.

Mr. Justice *Buller* said, he had taken time to consider it, on account of its being a matter of great importance, and that he was not sufficiently informed as to the rule that had been laid down: that the first thing to be considered was, whether the Court had laid down any rule: if it had, it ought to be abided by; for he was a great enemy to making nice distinctions between cases before the Court, and those already determined: that Mr. Mitford had referred to a case of *D'Oyley v. The Countess of Powis* (ante, vol. ii. p. 32), but that the report was so short, that he could not tell whether that case was precisely the same as the present. It only appeared, that the money was laid out by Lord Beauchamp, and it seemed to be laid out upon his application. That the general rule laid down was, that it was considered as being in payment, and if so, it was indifferent which side applied that it should be laid out. That [*53] it appeared that was not a new case, for that Sir Thomas Sewel had made several such orders, and the money paid in was always considered as in part payment. This obviates the doubt as to the vendor, who must always take the stock as he can find it. Another circumstance in this case makes it clearer, that the money was paid into the hands of the auctioneer, who paid it to the agent of the vendor; therefore the general rule has prevailed, that, let the money be laid out as it will, it is a payment for so much of the purchase-money. And, if laid out without opposition from the seller, it must be presumed to be with his assent. If laid out under the authority of the Court, it will be binding on both.

Another ground on which the petition must be dismissed is, that it comes after a decree for a specific performance.

His Lordship was going into other merits of the petition, when, it being alleged that the parties had agreed to draw up the order agreeably to the opinion he should pronounce on the subject of the money laid out, he ordered the petition to be dismissed. (2)

(2) The petition was not dismissed; but an order was drawn upon consent. — R. L.

MALCOLM v. MARTIN and Others. Rolls, 1st [and 22d] Feb.

(Reg. Lib. 1789. B. fol. 241.)

Testator living in Antigua gives legacies described to be sterling; then another without that description, the interest to be paid to the children of J. G. and Mrs. L. for life, then the principal to be divided among the grandchildren of J. G. and Mrs. L. 1st. The latter legacy is only a legacy of current money of (1) Antigua. 2d. The interest to be paid to the children for life shall be at 4 per cent., not Antigua (2) interest. 3d. [Under all the words taken together, the children held to take as jointenants, and] there being no children of J. G. the children of Mrs. L. shall take the whole interest for their lives; nothing passing to the grandchildren till the death of all. (3)

PATRICK MALCOLM, late of the island of Antigua, deceased, made his will, dated 16th August, 1785, and, thereby, gave to his sister Janet Mackenzie (since deceased), the interest of 1000*l.* sterling for her life, and at her decease that sum to be equally divided between the plaintiffs, the Malcolms. He also gave to the children of Mr. John Glass, deceased, and the children of Mrs. Lyon, deceased (who were defendants), the interest of 1500*l.* for life, to be equally divided between them, and at their decease, the same to be divided betwixt the grandchildren of each, Mr. Glass and Mrs. Lyon; and appointed the defendant Samuel Martin and others executors. The testator died 20th Aug. 1785.

John Glass died in the lifetime of the testator, leaving no children surviving him, but having, at the time of his decease, *and [*51] of the decease of the testator, five grandchildren by his daughter Agnes, who was married to Thomas Sandeman, and who died before her father, and also one grandchild by another daughter, Ann Glass. These grandchildren of John Glass were defendants.

Agnes Lyon, the testator's sister, also died in his lifetime, leaving three children, all now living, and defendants, of whom one, Robert Lyon, had, at the decease of the testator, nine children, one of whom was since deceased; the other eight were defendants.

The bill was filed by the plaintiff against the acting executor, and the several other defendants, charging that the legacy of 1500*l.* given to the defendants' children of Mr. Glass and Mrs. Lyon, for life, remainder to the grandchildren, ought to be considered as currency of the island of Antigua, where the testator had lived upwards of twenty years, and where he died; and claiming the legacies given to Janet Mackenzie for life, with remainder over to them.

The defendants, who claimed as grandchildren of Mr. Glass, submitted, by their answer, that their parent being deceased, a moiety of the legacy, in sterling, was, with the interest thereon, to be declared to belong immediately to them and the said defendants, the grandchildren of Agnes Lyon; and that, upon the death of the three children of Agnes Lyon, the other moiety should be divided among them; or, if the Court should be of opinion that no part became payable, but that the three children of Agnes Lyon were entitled to the interest for life, either with or without benefit of survivorship, hoped they should be declared entitled subject to their interests.

(1) Vide *Pierson v. Garnet*, antea, 2 vol. 33, and the Editor's notes. *ibid.*

(2) See the Editor's notes to *Pierson v. Garnet*, antea, 2 vol. 38, referring to *Bourke v. Ricketts*, 10 Ves. 330, 333, 334, &c.; *Raymond v. Brodhelt*, 5 Ves. 199, &c.

(3) His Honor expressed a clear opinion, that on such event, the grandchildren would take *per capita*; but it was premature to decide that point. From Lord Colchester's MSS. Vide *Phillips v. Garth*, postea, 64.

The defendants, children of Agnes Lyon, claimed the whole interest of the legacy, as sterling money, for life, with benefit of survivorship, and prayed that the same might be secured for their benefit, and that of the other parties.

The cause came on at the Rolls, 6th July, 1788, when

Mr. *Selwyn*, and Mr. *Daniel*, argued, for the plaintiffs, that the [*52] legacy to the defendants of 1500*l.* not having the word *sterling* *annexed to it, must be paid only in the currency of Antigua; and for this they cited the case of *Saunders v. Drake*, 2 Atk. 465, where a testator living in Jamaica, gave legacies to be paid in sterling money, and gave two legacies immediately following (one of which was plaintiff's) generally, and afterwards other legacies, to be paid in sterling money; Lord Hardwicke held the plaintiff's legacies to be of currency only; and that of *Pierson v. Garnet* (ante, vol. ii. p. 38), where legacies given generally, in Ireland, were decreed to be legacies of Irish currency, not sterling.

Mr. *Mitford* and Mr. *King*, for the children of Mrs. Lyon, argued that they must take the whole interest for their lives. The testator expressly says the principal is not to be divided till after the decease of the children of both, and there being no children of Glass at the testator's decease, it is clear only the children of Mrs. Lyon can answer the description. The intention clearly was, that the children of Glass and Lyon should take the whole interest before the grandchildren should take anything. If this was otherwise, the whole fund would not be divided in the same manner. By this way, all the grandchildren will take; on the contrary construction, it may happen that only some of them may take.

Mr. *Ainge*, and Mr. *Hatton*, for the grandchildren of Mr. Glass, contended that the children of Mrs. Lyon were entitled to only a moiety, and that their clients were entitled to one moiety immediately. It was not known to the testator, when he made his will, that Glass had, at that time, no children. He meant to divide the fund between the children of Glass and Lyon, and then to give it to the grandchildren. It is a tenancy in common between the two stocks; and, one stock being extinct, the representative must take that moiety immediately; for, if the children of Lyon are entitled for life, it must still, after their decease, be divided *per stirpes*; and if a moiety is remaining to be divided, the grandchildren of both will take *per capita*.

On the 1st February his Honor gave judgment, to the following effect:—

The question is with respect to the interest of the grandchildren [*53] of Glass and Lyon. It is clear they are not to take till after *the failure of the children; it is therefore unnecessary at present to decide how they will take then. Although the fund is not given to the survivors, it cannot go over till the death of the children of both. Mr. *Ainge* contended (4) there was a difference between the claims of the issue of Mr. Glass and Mrs. Lyon; that difference was argued in *Wicker v. Mitford* (reported in Mr. Hargrave's Tracts, p. 513). The tenancy in common, implied in the will, can only extend to the interest; but the principal being only given over after the death of the children, occasions

(4) Mr. Cox's notes correct this part of the report, as follows:—"Mr. Ainge contended, that there was a tenancy in common between the two stocks of Mr. Glass, and Mrs. Lyon. Similar words have occurred in many other cases, as in *Wicker v. Mitford* (reported, *ut supra*), but that argument did not prevail."

a necessity to consider it as a jointenancy. (5) A case not cited proves the principle, that the words of a will, if they will bear a sensible construction, must be taken in that sense. *Blackler v. Webb*, 2 Wms. 383, where Lord Chancellor King said, that, to determine the grandchildren to take *per stirpes*, would be to go too much out of the will. *Thomas v. Hole*, Forr. 251, is to the same effect. In *Jackson v. Clarke*, Lord King thought himself bound by the words of the will. The words, here, are the interest to the children of Glass and Mrs. Lyon for life, and after their decease the principal to be divided among the grandchildren. (6) I must declare, therefore, that the interest of the 1500*l.* must be divided among the children of Mrs. Lyon during their lives. (a)

2. Then the testator by his will has given some legacies described as sterling, others (among which this is) without that description: I am satisfied, by the case of *Saunders v. Drake*, that I must declare the sterling legacies are to be paid in sterling money, and the other in Antigua currency. (b)

3. There is a question, whether the interest should be Antigua interest or the interest of the Court. In *Pierson v. Garnet*, Sir Lloyd Kenyon gave interest at 4 per cent. though he decreed the legacies to be currency. In *Saunders v. Drake*, it was decreed according to the custom of the island, but that point does not appear clearly in the Register's book. The point was not argued in *Pierson v. Garnet*. It is not proper for me to decide on this point. If I was sure it would go further, I would decide the point. There have been several cases upon the point decided differently. *Stapleton v. Conway*, 1 Vesey, 427. (7) It appears that was upon contract, (8) not a legacy, English interest only was given. In *Holme v. Allwright*, cited in *Boddam v. Ryley* (ante, vol. ii. p. 2), Indian interest was given. If the matter was *res integra*, I think there is *no reason for giving more than the usual interest given [*54]

(5) Mr. Cox's notes here add, "The intention of the testator may perhaps have been otherwise; but the words are too strong to allow me to raise conjectures."

Lord Colchester's notes of this part of the judgment, are as follows: "The true construction is, that until failure of all children of J. G. and M. L. the fund is not to be divided, and that the children take the whole for life with survivorship, *inter se*. It is contended, that, supposing the children take for life only, they take only one half for life, and that the other half goes to grandchildren on these words, viz. 'To children of J. G. and M. L. deceased, 1500*l.* for life.'"

"I agree, it is true, that this is a tenancy in common between the children of J. G. and M. L. for their lives. But the gift over after the decease of all will be a jointenancy; i. e. the interest of each dying survives to the other, 5 Co. Brad. Case, and 1 Mod. there referred to, that a gift to two, without saying to the survivor, nevertheless may give survivorship. There was no distinction of the stocks in *Wicker v. Mitford*, upon the words '*betwixt*' grandchildren. And *Blackler v. Webb*, 2 P. W. 383; cited in *Wicker v. Mitford*, proves the principle, that the words of a will, if they can be reasonably construed, shall be attended to; and *Thomas v. Hole*, Forrest. the same principle. As to the interest of 1500*l.* after their death between grandchildren, I have a decided opinion how it will be then; but the case has not now arisen."

(6) "Is it possible for me, without doing violence to these words, to give the principal to the grandchildren while there is any child, either of Mrs. Glass or Mrs. Lyon, alive? I think not: nor shall I do any injury to the words, when I say, that the interest must be equally divided while there is any child alive. What would then become of it I need not now determine, whoever will be entitled to it will apply."

(7) Vide Supplement to Vesey, 185, &c., and per Sir W. Grant, M. R. in *Bourke v. Ricketts*, 10 Ves. 333, 334.

(8) Mr. Cox's notes refer also to the case of *Champant v. Lord Ranelagh*, Prec. Ch. 128.

(a) See upon this subject, *Phillips v. Garth*, post, 64 and notes.

(b) Story, Confli. Laws, ch. 11, § 479 b; ch. 8, § 312, 313; *Lansdowne v. Lansdowne*, 2 Bligh, 91; 2 *Williams Ex. Pt.* 3, Bk. 3, ch. 4, § 7, p. 884; *Pierson v. Garnet*, 2 Bro. C. C. 47.

by the Court. What is the ground on which the Court gives 4 per cent. interest? That the fund is supposed, in the course of the year, to come into the hands of the executor, and that the executor can make 4 per cent. of it here. If it was made out, indeed, that the fund was abroad, and greater interest made, it might be otherwise. But I am rather disposed to postpone the decision of this point.

His Honor, afterwards, decreed the interest to be at 4 per cent. (9) (c)

(9) One of the noble Lords, who favored the Editor with their notes, observes on the principal case, that "the reasonable course seems to be, to direct an inquiry in what country the fund out of which the legacy is payable has been placed from the time when it became payable, and to direct the rate of interest accordingly to the interest of that country. Indian if in India, and if in England, then 4 per cent. according to the course of the Court. By this mode, the personal representative will be charged with such interest as he had an opportunity of making, and no more."

It seems that the decision of Lord Loughborough C. in *Raymond v. Brodbelt*, 5 Ves. 199, which turned on its own particular circumstances, was upon the above principles.

(c) 2 Williams Ex. Pt. 3, Bk. 3, ch. 4, § 6, p. 882, 883. See, on the subject of the rate of interest to be allowed, *Boddam v. Riley*, 2 Bro. C. C. 2, 2, note, and cases; S. C. 1 Bro. C. C. 239.

PETERS v. ERVING and Others.

(Reg. Lib. 1789. B. fol. 186. b.)

Creditor having power to obtain warrants for payment of an American loyalist's debt out of his estate in America, is bound, on being referred to that property by the debtor, to make it available as far as may be; but when the creditor is not informed of such property, no laches can be imputed to him; he, therefore, shall not be restrained by injunction from prosecuting his suit here; (1) although the debtor shall have liberty to make use of the creditor's name to obtain the warrants to make them available as far as may be.

THE plaintiffs are the executors of Thomas Moffat, late of Newport in Rhode Island, M. D., deceased, and the defendants executors of John Erving, late of Boston in Massachusetts Bay (some of them resident in England and others in America), and the executor of John Moffat deceased.

Thomas Moffat, the plaintiff's testator, being possessed of a considerable estate in America, and being of a loyal subject of England, entered, with other persons, into a bond to Erving, the defendant's testator, dated 29th July, 1765, in the sum of 1975*l.* Massachusetts' currency, being the value of 1477*l.* 10*s.* English money, for securing payment of 984*l.* 13*s.* 4*d.* currency, equal to 738*l.* 15*s.* English money; and being obliged to withdraw himself from America, in May, 1775, arrived in Great Britain, and died at Westminster, 14th March, 1787. Erving, though a loyalist, was permitted to stay in America (being very old and infirm, and giving security for his good behavior) till his death, in the year 1786. The other obligors in the bond lived in America; and they, or some of them, had paid part of the debt, so that there remained a balance due to the defendants of about 259*l.* Upon this bond the defendants brought their action, in the King's Bench, against the plaintiff, as executor of Moffat.

(1) Vide *Kempe v. Antill*, ante, 2 vol. 11, and Lord Eldon's elaborate judgment in *Wright v. Simpson*, 6 Ves. 714, 726, &c. &c.; in which his Lordship differs from Lord Thurlow's opinion in *Wright v. Nutt*, post, 326, and others of Lord Kenyon and Lord Loughborough upon the subject.

The plaintiff filed his bill for an account of the money really paid, and for an injunction to restrain the defendants from proceeding on the bond: stating, that the plaintiff's testator had *considerable property in America (which the bill particularized), and that the persons who opposed His Majesty's government in America, passed sundry acts of Assembly, having the force of laws, whereby all persons who had withdrawn from the States now called The United States of America, into the dominions of the King of Great Britain, were declared aliens, and to have incurred the forfeiture of their goods, chattels, and real estates; and by the said laws it was enacted, that all debts justly due from the forfeiting persons, to any subject of the States of America, should be payable out of the forfeited estates; it further stated, that the whole property of plaintiff's testator, was forfeited and sold, subject to his debts; and that his estates were sufficient to have paid his debts; that, therefore, the defendants had been paid, or might have been paid, the whole of the debt.

Before the coming in of the answer, the defendants moved to dissolve the injunction, which was continued on plaintiff's depositing a certificate of the commissioners of American claims of Dr. Moffat's losses as a security.

The defendants here, by their answers, stated, that they did not know, till informed by the bill, that Moffat had property in America, and denied that they could have received payment of the bond from the States.

The defendants in America say, that, at the time of the forfeitures, warrants might have been obtained for payment of the debts, but that they would not now produce more than four or five shillings in the pound.

Mr. *Solicitor-General* now moved to dissolve the injunction.

Mr. *Mitford*, and Mr. *Richardson*, for the plaintiff, showed cause.

The executors in America state what Moffat's property sold for, and acknowledge several payments to have been made. They admit that Moffat's estates were forfeited, subject to his debts; but say they could not obtain payment, because the estates were appropriated to other purposes; and that the warrants, obtained in America, would not have been paid, and were not now *worth more than four shillings in [*56] the pound. To that extent we are clearly entitled to relief.

This question came on before your Lordship in *Wright v. Nutt*, Blackstone's Com. Pl. Term Rep. 123, where your Lordship said the party had an equity, as far as the debtor's property could be made available. Even supposing the warrants to be worth only four shillings in the pound, we shall show there were effects to pay the debt. The effects sold for 1370*l.*, the balance due is but 259*l.*

Mr. *Solicitor-General*, and Mr. *Hart*, for the defendants. It is stated too high, when it is stated that the defendant Erving was an American subject: he took part with this country; his sons came away, but he, being old, continued there till his death.

During Moffat's lifetime, he never desired the creditors to apply there, or even informed them he had American property, but paid money on account of the bond; so that whatever may be the case of a debtor who points out to his creditor a fund from which he may be paid, this is not that case; and the executor cannot, at the distance of thirteen or fourteen years, refer the creditor to that fund.

Although it is admitted that, in 1775, the defendant might have had a remedy in America, if referred thither at the time, there is now no

fund. The executors swear, that if warrants had been then obtained, they would not now have been worth more than four or five shillings in the pound.

LORD CHANCELLOR said, he thought if the creditor could *bonâ fide* obtain anything there, he ought so to do. The query here is, whether, now, anything can be obtained; but the defendants' swearing they did not know of the debtor's property there, till the filing of the bill, no laches can be imputed to them for not applying to a fund of which they were not informed. (a)

The injunction was therefore dissolved, the certificate to be returned, and the plaintiffs to be at liberty to use defendant's name, to obtain warrants for payment in America, and make them available as far as might be.

(a) See Eden on Injunct. (2d Am. ed.) 62, 63; Wright v. Nutt, post, 326 and notes. As to marshalling securities in general, see 1 Story, Eq. Jur. ch. 13, § 633, et seq.; Kempe v. Antill, 2 Bro. C. C. 14; Piatt v. St. Clair, 6 Ham. 233.

[*57]

*THRALE v. ROSS.

(1)

Action at law on a bond given to a trustee, only reciting that the obligor was (on the resignation of obligee's *cestui que trust*) appointed to an office, not restrained by injunction; but may be pleaded at law, in order to try whether the consideration was corrupt. (2)

BILL praying an injunction to stay trial on a bond, dated March 1, 1766, and given by the plaintiff to the defendant Ross, in the penalty of 5000*l.*, with a condition underwritten to the following effect: Whereas, on the — of last December, the above-bounden James Thrale was (on the resignation of Charles Gordon, Esq.) appointed his Majesty's consul to the state of Tunis, it is thereupon agreed, that if the above-bounden James Thrale, his executors, &c. shall pay to George Ross (the defendant), out of the salary, 200*l.* per annum, which annuity is to be in trust for the said Charles Gordon, during his life, and as long as the said James Thrale shall enjoy the office, as to 50*l.* to Margaret Gordon, wife to the said Charles Gordon, and 150*l.* to the said George Ross, to pay the debt due to him from the said Charles Gordon, then the bond to be void.

Mr *Solicitor-General*, Mr. *Mansfield*, and Mr. *Steele*, showed cause against dissolving the injunction.

They contended that the bond was upon a bad consideration; and that a jury, from the recital, would see what that consideration was: that it was manifestly a bond given for the resignation of an office, that the plaintiff might be appointed to it; and cited the case of *Hanington v. Duchatel*, ante, vol. i. p. 124; that it was sufficient to support an application here; that though it might be pleaded at law, it never had been so done. That, in the case of marriage-brokage, there could be little doubt but it would be pleadable at law, yet it never had been so pleaded; and there was not a doubt but this Court would entertain a jurisdiction in that case.

(1) No entry appears on this occasion, in R. L. It would rather seem from R. L. that the names of the parties were Teale v. Roffe. — Editor.

(2) Vide *Hanington v. Duchatel*, ante, 1 vol. 124, 125, with the Editor's notes.

But Lord CHANCELLOR (3) was of opinion that it ought to be pleaded in order to try the question whether the consideration was corrupt; saying, that in case it should appear to be for the resignation of the office, that might be sufficient: if it was for the appointment it would be still stronger, and, therefore,

Dissolved the Injunction. (a)

(3) Mr. Cox has favored the Editor with a note of the judgment taken by himself in Court as follows: Lord Chancellor. "I do not mean to say, that this Court will not set aside a bond on account of a corrupt consideration only, because it may be made the subject of a defence at law. By no means; for I think otherwise. (b) But in this case I think the question may as well be left to a trial at law, for I doubt whether the fact of the consideration is sufficiently before me. If the consideration were expressed to be resignation of the office, it would be clear; still clearer, if the procuring the appointment; but I doubt whether this recital is sufficient. There is certainly ground to suspect the fact, and other circumstances may be brought in aid before the jury. Therefore dissolve the injunction."

(a) See *Hanington v. Duchatel*, 1 Bro. C. C. 124, and notes and cases cited.

(b) See *Ryan v. Mackmath*, ante, 15, 18, and notes.

*WYNDHAM v. WYNDHAM. [Feb. 9th.] [*58]

(Reg. Lib. 1789. B. fol. 267.)

Testator ordered his trustees, out of certain funds, to pay to his wife what should be to be returned to her of her portion; and to invest the residue in funds to pay her the interest for life, then to pay the interest to his niece for life, then to pay the principal to her children, if any, if not to the younger children of H. W. W. if any, if not to the defendant W. W., and gave the residue of his effects to his wife. The niece and nephew had neither of them children. The intermediate interest, from the death of the niece to that of the nephew, shall not follow the principal, but fall into the residue, and go to the wife's executors, as personal estate of the testator undisposed of. (1)

WADHAM WYNDHAM by his will, 28th July, 1763, desired his nephew Wyndham, meaning Helgar Wadham Wyndham, and his cousin Penrud-dock Wyndham (the plaintiff), would, as his trustees, settle an account of what he had in the public funds, bonds, mortgages, or securities, and, after paying his dear wife, Catherine Wyndham, what, by their marriage-articles, was to be repaid her of her fortune, to vest the remainder in the public funds, in trust, and the interest, as it became due, to pay to his dear wife for life, and, after her decease, to his dear niece, Ann Cope (meaning the lady of Sir Richard Cope, Bart.), for life; but if she should die, leaving any child or children, he desired they would pay the principal to them; but if she should die without any child or children, he then left it to the younger children of his nephew, Helgar Wadham Wyndham, if he should have any; if not, he then left it to his cousin (the defendant), Wadham Wyndham. He gave and bequeathed all the rest (after giving some specific legacies) of his plate, jewels, household furniture, coaches, chariots, horses, stock on his farm, cows, and everything else he had any property in, to his dear wife, and appointed her executrix.

Wadham Wyndham died in October, 1759; the trustees paid the wife what was due to her under the settlement, and invested 1008*l.*, and other sums, in the 5 per cent. bank stock, and other funds, and paid the interest to Catherine, the wife, during her life. She died, and, by will, made the defendant Huntley sole executor.

(1) See this case approved of and stated, as having conclusively settled the doctrine, by Lord Commissioner Eyre, in *Shawe v. Cunliffe*, post, 4 vol. 151; Vide that case from p. 144, and *Descrambes v. Tomkins*, therein cited [from Mr. Cox's notes, 1 Cox, 123].

The trustees paid the interest to Lady Cope during her life; and she dying without children, and Helgar Wadham Wyndham being then unmarried, the principal money, laid out in the funds, vested in Wadham Wyndham, subject to the contingency in favor of Helgar Wadham Wyndham's younger children, if he should have any. Helgar Wadham Wyndham afterwards died, February 1784, without children; and a doubt having arisen, whether the interest of the funds, from the death of Lady

Cope to that of Helgar Wadham Wyndham, belonged to Wadham [*59] *Wyndham, or fell, as undisposed of, into the residue of the testator's estate, it was paid into the hands of Messrs. Hoares, and the present bill filed by the surviving trustee, to have the opinion of the Court on that question, which was solely between the defendants.

Mr. *Solicitor-General*, for the defendant Huntley, executor of the wife, contended that this interest was undisposed of, and fell into the residue. He cited *Green v. Ekins*, 2 Atk. 473, and *Haughton v. Harrison*, *ibid.* p. 329.

Mr. *Mitford*, and Mr. *Stratford*, for the defendant Wadham Wyndham. The interest between the death of Lady Cope and Helgar Wadham Wyndham, passes by the will, and belongs to Wadham Wyndham. The intention of the testator appears to be, to give everything that remains at the death of Lady Cope, to her children, if she had any; and all that he gave to the children of Lady Cope, he meant to go to the children of Helgar Wadham Wyndham, and if he had no child, then to Wadham Wyndham, who is substituted for the children of Lady Cope, or Helgar Wadham Wyndham. The gift to Wadham Wyndham, is a residuary fund, as to the property, of which the interest is given to the wife for life. The rule of not being in abeyance, does not apply to this, as to a freehold estate. It could not be the intention of the testator, that the interest should go differently from the principal; where he did intend it to go differently, he gave the principal to the trustee; but where he did not so give it, he meant it to follow the principal: and interest on a particular remainder will follow that, as the interest on the general residue will that general residue: but here the particular residue can never go with the general residue, being vested in Wadham Wyndham.

Lord CHANCELLOR thought it surprising, that there was no case in which this question had occurred; but said, where interest, till an event arrived, was not disposed of, it must fall into the residue: as, suppose the testator gave a bond to a particular person, not to vest in him till a given time, the intermediate interest must vest in the executor; and if a residue was given in the same way, the interest would also go to the executor.

[*60] *An account must be taken of the intermediate interest, as a part of the testator's general personal estate.

ANDREWS v. PARTINGTON.

[Vide S. C. 2 Cox, 223.] Lincoln's-Inn-Hall, 1st March.

(Reg. Lib. 1789. A. fol. 234. and 236. b.)

The Court will not give a maintenance for the time previous to the report of the father's not being of ability to maintain the children, (1) except on very particular circumstances.

THE grandfather having given several legacies, gave the residue to his grandchildren, at twenty-one, and the produce, in the meanwhile, to the trustees, for their maintenance, and appointed four trustees, of whom the father was one.

Mr. Partington, [the father, who was] one of the trustees, had expended 400*l.* in the maintenance of the children, previous to any report as to the inability of the parent to maintain them. And the question now was, whether he should be allowed the sum so advanced, and whether any maintenance should be allowed the children before the report.

Mr. *Mitford*, Mr. *Mansfield*, and Mr. *Graham*, for the trustees, insisted that the words of the will were imperative upon the trustees to allow a maintenance to the children; and that this had been done, and particularly referred to a case, *Fitzgerald v. Carey*, Mich. 1770.

LORD CHANCELLOR (2) said, although where there had been a bigoted father, who would not educate the child in the Protestant religion, the allowance had been made to the trustees, it was contrary to all rules, that the interest, vested in the children, should be applied to their maintenance in the lifetime of the parent. That this would amount to a gift to the parent of so much as should be necessary for the maintenance; and the father being a trustee, can make no difference. He therefore ordered the reference to be only as to the ability of the parent, (3) and that would be necessary for the future maintenance of the children. † (a)

† [See this case on the hearing, post. 401.]

(1) Lord Thurlow had decided accordingly in *Hughes v. Hughes*, antea < 1 Bro. C. C. > 387, but his Lordship afterwards altered his opinion; and it seems now settled, that the Court will, in a proper case, direct maintenance from an antecedent period without a reference to the Master as to the father's ability, and will even make such an order, although the author of the bounty may not have adverted to the subject. See the Editor's note to *Hughes v. Hughes*, antea, 1 vol. 387, 388, which refers to the progress of the doctrine.

(2) See a much better report of the judgment, 2 Cox, 223, 224.

(3) "To maintain and educate them suitably to their fortunes." — R. L.

(a) The rules laid down in the present and other cases, *Hughes v. Hughes*, ante, vol. i. 387, *Hills v. Chapman*, ante, vol. ii. 231; *Pulsford v. Hunter*, post, 416, have not only been departed from in modern practice, but it has been stated (3 Ves. 733), that Lord Thurlow himself changed his opinion upon the subject. At present, the Court looks with great liberality at the peculiar circumstances of each case, and will make such order as the rule prescribed by the testator justifies, and the conduct and situation of the parties allow. *Mundy v. Earl Howe*, post, vol. iv. 223; *Hoste v. Pratt*, 3 Ves. 730; *Sisson v. Shaw*, 9 Ves. 285; *Collis v. Blackburn*, ib. 470; *Maberly v. Turton*, 14 Ves. 499; *Jervoise v. Silk*, Coop. Ch. Rep. 52. Maintenance, therefore, will be allowed, even where there is a direction for accumulation, and the principal with the accumulation to be paid at twenty-one, where some or one of the children must take the property by survivorship, all being considered as having an equal chance. *Fairman v. Green*, 10 Ves. 45; *Ex parte Kebble*, 11 Ves. 604; *Aynsworth v. Pratchett*, 13 Ves. 321; *Errat v. Barlow*, 14 Ves. 202; *Stretch v. Watkins*, 1 Mad. Rep. 253. But if there is a gift over, it cannot be done without the consent of the legatee, which was taken in *Cavendish v. Mercer*, 5 Ves. 195, n.; *Fendall v. Nash*, ib. 198, n.; and the circumstance that such legatee has a gift by another part of the will, makes no difference. *Fairman v. Green*; *Ex parte Kebble*. Nor, if the children are not all the persons amongst whom it is to go, as in *Sir F. Eden's case*, where Lord Rosslyn had directed it, but Lord Eldon afterwards refused to continue it, as future children then unborn might be the persons to take part of it, cit. 11 Ves. 48, 604; *Errington v. Chapman*, 12 Ves. 80; for which reason the case of *Fendall v. Nash*, cit. sup. was improperly determined, as the prin-

But afterwards, by consent of the children in England and adult, their proportions were ordered to be paid.

cipal and interest might, upon certain contingencies, have gone to individuals who were not in existence. — *Eden*. } For the later cases on this subject, see *Hughes v. Hughes*, 1 Bro. C. C. 388, notes; *Hill v. Chapman*, 2 Bro. C. C. 231, notes; *Burnet v. Burnet*, 1 Bro. C. C. 179, and cases cited. On the subject of maintenance for time past, see further 1 Macpherson on Infants (Eng. ed. 1841), ch. 22, § 9, p. 246, et seq.

[*61]

*ELLISON and Wife v. COOKSON.

[Vide S. C. 1 Ves. jun. 100, and 2 Cox, 220.] Lincoln's-Inn-Hall, 8th, 9th March.

(Reg. Lib. 1789. A. fol. 175. b.)

Where a father gives a sum to his daughter, by will, and afterwards gives an equal sum as a portion, it is presumed to be an ademption. A conversation, in order to repel the presumption, must clearly refer to the gift by will, not to any hope of the father, as to a further provision from another fund, which he makes known to the party. (1)

THIS cause, which had been heard before Lord Kenyon, when sitting, as Master of the Rolls, for Lord Chancellor, 27th February, 1788, and the bill dismissed (v. ante, vol. ii. p. 307), was now reheard.

It appeared that Mr. Cookson had an elder daughter, who was married at the time of the will and instructions, who, at her marriage, had a portion of 5000*l.*, and whose name was not mentioned in the will or instructions.

Mr. Mansfield, Mr. Lloyd, and Mr. Graham, for the plaintiffs. The question is, whether under the circumstances of this case, the legacy of 5000*l.*, given in the paper of instructions, is taken away.

We do not mean to dispute the rule, that, where a father, by will, gives his child 5000*l.*, and afterwards pays 5000*l.* as a portion, this is an ademption; though it will be otherwise in the case of a stranger: *Powel v. Cleaver* (ante, vol. ii. p. 499). But if there be anything to show that the portion was paid without an intention to adeem, the mere payment will not amount to an ademption, *Debeze v. Mann* (ante, vol. ii. p. 165), where a very slight conversation was held sufficient. Here the strongest evidence arises from Bush's treaty with the father, that he intended to give his daughter a further fortune. The evidence here is stronger that he did not mean to adeem, than that he did. But this is not the proper tribunal to judge of that evidence. In this case, the instruments are not codicils; they are all on one paper, and dated on the same day. And, for the six years that the father survived, he never made any declaration that he intended the 5000*l.* given as a portion, to be a satisfaction for that given by the will, though he knew, at the time he gave her the 5000*l.* portion, that he had given her 5000*l.* by the will; he therefore meant to keep it in his own power, during his life.

Mr. Solicitor-General, Mr. Mitford, Mr. Ridley, and Mr. Richards, for the defendant. There is no difficulty in settling the principle upon which the judgment in this case must proceed; that

(1) See this case on the former hearing, ante, 2 vol. 307; the reports of the present decision, 1 Ves. jun. 100, and 2 Cox, 220; and the observations on the case of Lord Eldon C. 7 Ves. 615, 617, 618. Vide also per Lord Eldon C. 18 Ves. 163, 164, and the Editor's note to *Warren v. Warren*, ante, 1 vol. 306.

where a parent has given a sum of money to the child, by will, and afterwards pays an equal sum upon marriage, such payment is an ademption. A consequence of this rule is, that the parent is supposed to be *conusant* of it; and that merely keeping the will by him, does not repel the presumption; for it is a settled rule of the Court that there must be some evidence set up to rebut the presumption. This rule may, in some cases, have done injustice; but, in the present case, it is impossible that it should. The state of the testator's family was this; he had four sons, and three daughters; the eldest daughter was married, and he had given her, on her marriage, 5000*l.*, he takes no notice of her in his will; he gives Hannah, and Sarah, 5000*l.* each; to the sons he gives 10,000*l.* each; it is in evidence, that Hannah was a very favorite child; but he certainly meant to provide equally for his daughters, and would not undertake to give her a further sum. Mr. Bush, in his letter, says, he refused to promise any specific sum, and his plan certainly meant to refer to what might be done in future by his wife. Mr. Cookson, afterwards, says, Mr. Bush has mistaken what may be possible or probable; but he would not say that it even was probable that the further sum would be 5000*l.* It was to await the chance of the savings, and Mrs. Cookson was to judge of the merits of her children, though he might think it might amount to 5000*l.*, but the father has by no means undertaken for that sum. If they have not made out a claim to 5000*l.*, they cannot claim any sum. Then the presumption stands that by giving the 5000*l.* he adeemed the legacy. Then it is said, he could not mean to adeem the legacy unless he struck it out of the will. But this has never been expected. Suppose he had died immediately after the marriage; could it have been argued, that the legacy was not adeemed? The living till 1783 is not important. A similar length of time has never been held to be, of itself, a circumstance to rebut the presumption. Then it rests upon the amount of the declarations, which, certainly, do not amount to a promise of 5000*l.*

LORD CHANCELLOR. At first, I thought I ought to say the gift was in satisfaction of the legacy. The argument is, that the will is a distribution of the testator's property among his children; and if he advances the proportion to a child, the presumption of law is, that the provision is satisfied. (a) I say presumption of law, because it is put that it is proper to go to a jury; but that would be to send to a jury a presumption of law. At the same time it is a presumption capable of being rebutted by evidence. (b) The evidence, in this case, may be drawn from the language of both gifts. The plaintiff must show, he meant the gift to subsist. With respect to the treaty, the use of it in evidence is to show the testator's intention. (c) The struggle, on the part of Ellison the father, is, whether he can get more than 5000*l.* for his son, after getting an undertaking from the father that he should have something more. Bush says Mr. Cookson, would not engage for any specific sum—he has stated the conversation a little too widely, though not for the purpose of surprise,

(a) See *Paine v. Parsons*, 14 Pick. 318, 320; *Richards v. Humphrey*, 15 Pick. 133, 135.

(b) See *Ellison v. Cookson*, 2 Bro. C. C. 309, note (b) and cases cited; 2 Story, Eq. Jur. ch. 30, § 1114; *Debeze v. Mann*, 2 Bro. C. C. 166, notes; 3 Phil. Ev. (Cowen & Hill's notes) 1494, 1495; *Haynes v. Mico*, 1 Bro. C. C. 129; *Byrne v. Byrne*, 3 Serg. & R. 60, 62.

(c) In *Richards v. Humphreys*, 15 Pick. 139, the court say, that when an act is done, which if done with one intent would operate as an ademption, and if with a different intent, otherwise, evidence of the declarations of the intent may be given, to qualify the act, and the act operates by way of ademption. The evidence in such case is admitted on the principle, that whenever an act is done, the declarations of the party doing it; made at the time, are received to show the character of the act, and the purpose and design with which it is done.

into "equal or nearly equal," which is going beyond the point of the conversation. The furthest engagement does not contradict the latter *in toto*; it does not amount to an engagement, that the future sum shall be equal, or nearly equal; it leaves it with the idea, that it was possible or probable that it would be equal, or nearly equal: had the father in his letter left it thus, it might have introduced the whole,—but he goes on "that he told him his plan, which was to be executed by his wife." This is agreeable to the terms of the codicil, which were, to leave the property bound, as far as 40,000*l.*, but refers, for everything further, to what the savings may produce, and which were to be disposed of by his wife. This is the plan he alluded to. With respect to the rule of law, I think, if neither the rule itself, or the mode of rebutting it, had ever prevailed, it would have been as wise: but, as it is, I must admit that such a presumption exists; and though it is argued, testators may not know it, yet I think, if there is such a presumption, the subject is bound to know it. And, in the present case, I think the probability is, that the testator had some knowledge of the rule; all the argument, therefore, must turn on the validity of the rebuttal. It is argued that he had given his married daughter 5000*l.*; that, by his will, he gave his sons, 10,000*l.* each, his unmarried daughters 5000*l.* From the conversation, it may be drawn, that he hoped the surplus would be divided in much the same proportions: in which case, the daughter, who was the subject of it, would have equal, or nearly equal, to the fortune given her on her marriage. It was a hope of an uncertainty: to have held it out as an event that was certain would have been an inaccuracy. I think the letter points this out, as he had pointed [*64] out the fund *from which the uncertain sum was to arise. To apply this to the general rule, the conversation ought to show that he meant the gift to be a subsisting gift: the expression, here, is only as to what he hoped would be administered to her through the organ of her mother: if he had referred to the gift in the will, the conversation would have been applicable to the whole sum in the will, which could not have been altered. But my opinion is, that the reference, in the conversation, was sufficiently clear to confine it to that part of her fortune which she was to receive otherwise, and where I hope this mistaken mode of seeking it will make no difference.

Decree affirmed. (*d*)

(*d*) See *Ellison v. Cookson*, 2 Bro. C. C. 309, and notes.

PHILLIPS v. GARTH.

In Court, Hilary term, Mr. Justice Buller for the Lord Chancellor. Lincoln's-Inn-Hall, 10th March.

(No Entry on this Occasion.) (1)

Gift of residue to be divided among next of kin, share and share alike, shall be divided among surviving brothers, nephews, and nieces (representing deceased brothers and sisters), *per capita*, not *per stirpes*. [Sed quære.] (1)

JOHN PHILLIPS, Esq., made his will 28th December, 1775, and, thereby, gave to his brother William Phillips, for life, his manor of Blewberry

(1) The matter was afterwards compromised. This decision is very questionable. See

(after the decease of the testator's father), with divers intermediate remainders, with remainder for life to his brother George Phillips, and after giving some pecuniary legacies, gave and bequeathed all the residue of his estate and effects whatsoever and wheresoever unto his executors, to be equally divided by them to and amongst his next of kin, share and share alike.

The bill was filed by the nephews and nieces, and the representatives of a deceased nephew and two nieces, of the testator, against the executors, and against George Phillips, one of the brothers, and the representatives of a deceased brother and sister of the testator, insisting that all the next of kin, thirteen in number, were entitled to equal shares, *per capita*, of the personal estate of the testator.

The defendants, George Phillips and Mathew Phillips, the representative of the other brother William Phillips (who was living at the testator's decease), claimed the whole residue as next of kin to the testator at the time of his decease.

*George Shakespeare, the representative of a sister who died in [*65] the lifetime of the testator, claimed one fifth, as son of the deceased sister.

The cause came on in Hilary term, Mr. Justice Buller sitting for Lord Chancellor.

Mr. Mansfield, Mr. Mitford, and Mr. Holist, for the plaintiffs.

The construction depends upon a few words of the testator's will, who, after having made several specific dispositions of his property, gives the residue to his executors, to be by them divided to and amongst his next of kin, share and share alike. He left two brothers, one since dead, and ten nephews and nieces, four of whom claim as representing Thomas, a deceased brother, and six as representing Christiana, a deceased sister, of the testator, and George Shakespeare, who claims as representing his mother Elizabeth, another sister of the testator. The brothers claim the whole, considering that, as next of kin they are the persons entitled under the statute of distribution; but, if they are not solely entitled, still that the distribution ought to be *per stirpes*, therefore, that four of the plaintiffs should have but one fifth share, and six of the plaintiffs another fifth share, and themselves and George Shakespeare one fifth each. In this latter claim George Shakespeare also concurs.

The question is, who are entitled to take; and, on the part of the plaintiffs, we contend that the residue is to be divided among the same persons who would have taken had no disposition been made; but that they are to take equally, and not in the shares marked out by the statute.

Questions of this sort have so often arisen, that there can now be no doubt about the construction of the words, "next of kin." Most of the cases have the word "relations," as *Thomas v. Hole*, Forrester, 251 [vide postea, 234], and *Green v. Howard* (ante, vol. i. p. 31), in both which cases, the word *relations* was held to be the same as *next of kin*. The words *next of kin*, therefore, in this case, being tantamount to *relations*, must have the same construction. The brothers of the testator put a new construction on the words, and contended that they were the next of kin *at the time of the testator's decease. But the testator [*66] could not mean to give the residue to the brothers only: he clearly

notes (3) and (6), particularly Lord Eldon C.'s observations in disapprobation of Mr. J. Buller's opinion in the principal case in *Garrick v. Lord Camden*, 14 Ves. 385; cited afterwards in note (3); and *Smith v. Campbell*, before Sir W. Grant, M. R., Coop. Ca. Ch. 275; } and note (b), p. 69. }

meant more than two persons, and that it should be divided among a number. The 6th clause of the statute of James provides who shall be entitled to call for distribution, the next of kin and creditors, where next of kin cannot exclude nephews and nieces; and it is clear, then, the only question is, how it shall be divided. The words *share and share alike* exclude the idea of its being in fifths. The case of *Thomas v. Hole* seems provided to decide the present; there the gift was to the relations of Ann Hole. It is a case in point, except that here the words are *share and share alike*, and, there, they were *equally to be divided*. The words *share and share alike* were in the case of *Green v. Howard*, though they are omitted in the report. *Goodinge v. Goodinge*, 1 Vesey, 231; *Whithorne v. Harris*, 2 Vesey, 527.

Mr. *Solicitor-General*, for the defendant, George Shakespeare. We contend that the division should be *per stirpes*, and the words *share and share alike* are to be referred to the statute for their interpretation.

There is a considerable difference between the words, being "*relations*" and "*next of kin*." Where the word used is *relations*, the Court only uses the construction to bound the extent of the word *relations*, but where the testator uses the words *next of kin*, he means the persons described by the statute, and that it should be divided in the same manner as it is given there. Suppose the brothers are not to take all, then the brothers and children of deceased brothers and sisters are to take share and share alike. The provision made in the statute is one third to the wife, and the remainder by equal portions to the children or persons representing those who are dead; or, if no children, to the brothers and sisters, and the children of deceased brothers and sisters. The construction of the words "in equal portions" is *per stirpes*; that is, an equal proportion to each class, all of which classes form the next of kin. In the 6th and 7th clauses of the statute, equal division is applied in this sense, and the statute accounts the fortune to be equally divided when it is divided *per stirpes*. Immediately after the statute, this must have been the construction. If the testator gives it to his brothers and sisters, and the children of [*67] those deceased, to take *per capita*, he *does not say to take as next of kin, *Blackler v. Webb*, 2 Wms. 383.

In *Green v. Howard*, a certain sum was to be divided in proportions of a certain amount; and it was contended that he meant persons more numerous than the next of kin; as, otherwise, they would not exhaust the fund, they not being to take more than 250*l.* each. Where a testator gives in the words of the statute, it is fair to argue he meant they should take in the proportion of the statute: but where he uses the words *relations*, it does not follow that he means the legatees to take in the character of the statute.

As to the brothers only being intended to take, the words "*next of kin*" must mean, in some sense, all the persons within the statute; but, if these words will comprehend the children of deceased brothers and sisters, they are not to be taken in the narrow sense contended for against me.

Here the intention is clear that they shall take as next of kin under the statute.

Mr. *Attorney-General*, for the brothers of the testator. We contend, 1st. That the brothers are exclusively entitled. 2d. That if this be not so, the division must be in the mode prescribed by the statute.

1st. It is familiar to consider those who are the nearest living as next of kin; not to consider those who are so by representation, of which many people know nothing at all. There is no case where *next of kin* has been extended to *relations*, though the word *relations* has been bounded, by the

determinations, to signify *next of kin*. In *Green v. Howard*, Lord Chancellor said the testator must know the word *relations* meant more than *next of kin*. 2d. The extending the words to taking *per capita* would be making the testator die intestate, which he certainly did not mean to do. It would be to *extend* words by construction instead of *bounding* them, which has never been admitted. Here, nobody can be let in besides the brothers, without extending the words "*next of kin*." The substance of all the cases *is, to find out the persons who are intended [*68] by the testator to take.

Mr. Justice *Buller* stated the case. It is laid down as clear, that, if a testator uses technical terms, they shall carry the interest according to known rules; but this seems to be laid down too broad. In *Hodgson v. Ambrose* (reported *Douglass*, p. 337), I laid down the rule somewhat differently, that where the testator uses only technical phrases, the Court is bound to understand them as such; because the Court cannot say that he did not know their meaning; but, if the testator uses other expressions in other parts of the will, which show he did not mean to use those phrases technically, then the intention must prevail. (a)

Then if the words *next of kin* are technical words, in the present case, they must prevail.

It is argued by the Attorney-General that these words have a natural sense, different from that in which they are used in the statute of distributions, and that their natural sense must prevail. But, since the statute of James, these words have had a particular sense. Every inference, that can be drawn, is, that the testator used them in the sense that every one understands; and if it does not appear that he used them in some other, that sense must prevail. It is suggested that he meant, by *next of kin*, his two brothers; but, having just before mentioned them, he would have named them as his said brothers, not used the term *next of kin*. In the cases determined, the word *relations* has been considered as a vague word, and therefore to be explained by *next of kin*. It is true, it has been contended that these mean nearest relations, but that it cannot be so has been determined in *Whithorne v. Harris*. Then, those must take whom the statute points out, but the question is, in what shares. If it had pleased the Court, originally, to say that next of kin should take in the same manner as under the statute, I should not have objected to it, for it seems to me they should take *per stirpes*. But, in *Blackler v. Webb*, 2 Wms. 383, the Lord Chancellor was, at first, of opinion that they should take *per stirpes*, but said afterwards they could not do so, because the testator's daughter Webb was living, and so her children could not represent her: and to determine that the grandchildren should take *per stirpes* *would be going too much out of the will: and therefore, though [*69] he had at first a strong inclination the other way, he thought that, where the words were plain and sensible, the Court could not reject them.

It is a very probable ground of the bequest, here, to the next of kin, that the testator did not mean to give the executors more than he had done, having given them very amply before. It is agreed if he had given to his next of kin by name, they must have taken *per capita*; then the question is, whether calling them *next of kin* is not equal to naming them.

I cannot distinguish this case from that of *Thomas v. Hole*. That case

is in point, except that there the word is *relations*, which, being to be construed *next of kin*, makes it this case. The second resolution in that case is, that, as the testator had directed it to be divided equally, Lord King said he could not order it to be divided otherwise. *Equally to be divided* is exactly the same as *share and share alike*. *Green v. Howard* is sufficiently stated in the report for the purpose intended; the only question was, whether *relations* meant the same as *next of kin*. The facts required no more; the persons to whom the Lord Chancellor decreed the payment were all in equal degree.

The whole of the residue must be divided into thirteen parts, of which the brothers, nephews, and nieces are each to take one share. (3)(b)

The defendant George Shakespeare presented a petition to the Lord Chancellor, upon which the cause came on to be reheard at Lincoln's-Inn-Hall, on the 10th March.

The argument in general was much to the same purport as before, but Mr. Lloyd, in support of the petition, cited the cases of *Car v. Bedford*, 2 Ch. Rep. 77; *Roach v. Hammond*, Pre. Ch. 401; and *Hands v. Hands*, at the Rolls, 24th January, 1782, where J. Hands made his will, and thereby appointed his wife executrix, and gave her all his estate, subject to the payment of debts and legacies for life, and then declared his will to be that she should give the whole (except 400*l.*) to and among his relations. The Master of the Rolls held that the wife had no discretion (4) as to the distribution, and that the next of kin were entitled.

[*70] *There was no petition presented by the brothers, but Lord Chancellor leaning much in favor of their claim, (5) as next of kin at the death of the testator, ordered the cause to stand over, in order for them to present a petition of rehearing.

(3) Lord Eldon C. in *Garrick v. Lord Camden*, 14 Ves. 385, disapproved of Mr. Justice Buller's decision, and agreed with Lord Thurlow's impression on the case, though he thought Lord Thurlow's mode of reasoning somewhat too technical. Lord Eldon says there, "I always had great doubt upon the case before Mr. J. Buller; who thought those who were to take *per stirpes* as well as those taking *per capita* were included. Lord Thurlow doubted that, upon this very technical reasoning (to which his Lordship was much addicted in the construction of these instruments), that 'next of kin' being the only description, without the addition which is in the statute of those who represent them, the children of the deceased brothers and sisters ought not to take under the bequest. It is very difficult to say they would not have taken under this will; my construction being, that the next of kin should take the whole as they would take under an intestacy."

(4) Lord Redesdale's notes deny this.

(5) Vide the preceding note.

(b) Subsequent authorities must be regarded as having overruled this decision. See remarks of Lord Eldon in *Garrick v. Camden*, 14 Ves. 385; and of Sir William Grant in *Smith v. Campbell*, 19 Ves. 404; S. C. Coop. Ch. Ca. 277, and of Sir Thomas Plumer in *Brandon v. Brandon*, 3 Swanst. 324; S. C. 2 Wilson, Ch. Ca. 23. And it may now be considered as established, that if the words are "next of kin," and there is nothing to show that the testator had reference to the statute of distributions, or to a division as in case of intestacy, the nearest of kin only are entitled. *Smith v. Campbell*, 19 Ves. 404. Hence, a surviving brother of the intestate will be entitled in exclusion of the children of a deceased sister. *Brandon v. Brandon*, 3 Swanst. 312; S. C. 2 Wils. Ch. Cas. 14. *A fortiori*, the nearest of kin will be alone entitled under a bequest to "nearest of kin in equal degree." *Wimbles v. Pitcher*, 12 Ves. 433. See, respecting the above, 2 Williams, Ex. Pt. 3, Bk. 3, ch. 2, § 2, p. 732, 733. The principal case is directly overruled by *Elmsley v. Young*, 2 Mylne & Keen, 780. See 4 Kent (5th ed.), 537, and note upon this point, and cases cited; also Mr. Cox's note to *Blackler v. Webb*, 2 P. Wms. 386, and Mr. Serg. Williams's note to *Hole v. Thomas*, Forr. 251. See in the present publication, *Green v. Howard*, 1 Bro. C. C. 31; *Malcolm v. Martin*, ante, 50; *Rayner v. Mowbray*, post, 234; *Butler v. Stratton*, 367; *Masters v. Hooper*, 4 Bro. C. C. 207. That, *prima facie*, a bequest by a husband to his next of kin does not include the wife; nor a similar bequest by a wife, under a power, include the husband; also that his marital right, as administrator by law, is excluded by a limitation in a settlement to the next of kin of the wife, see *Watt v. Watt*, 3 Ves. 244; *Griffin v. Nanson*, 4 Ves. 344; *Garrick v. Lord Camden*, 14 Ves. 372; *Anderson v. Dawson*, 15 Ves. 537; *Bailey v. Wright*, 18 Ves. 49, affirmed on appeal, 1 Swanst. 39.

But the cause was afterwards compromised, the parties dividing the property among them *per stirpes*. (6)

See the case of *Edge v. Salisbury*, Amb. 70.

(6) Ordered, upon consent, accordingly, on the 12th of June following. (Reg. Lib. 1789. B. fol. 467. b.)

SAMUDA v. FURTADO. Lincoln's-Inn-Hall, 12th March.

(Reg. Lib. 1789. B. fol. 268. b.)

Plea of payment of a sum into the ecclesiastical court, to prevent a commission of appraisement, and accepted, and a receipt given, disallowed as a plea in bar to a suit, it not showing that the party had no further demand. (1) A defendant to a bill of revivor cannot plead to that suit a plea which has been pleaded by the original defendant, and overruled.

THE plaintiffs were the representatives of Isaac Lusitano de Pinna (who in his lifetime had been discharged under an insolvent debtors' act), and Maria Agnes de Pinna, his first wife, also of several persons of the family of Monforte, and the representative of Moses Alvarenga, who was assignee of the effects of Isaac Lusitano de Pinna, as an insolvent debtor. The defendants were the representatives of Daniel de Flores, and also of other persons of the family of Monforte.

The original bill had been filed in the year 1734, by De Pinna, and his wife, against Flores and others, claiming, in the right of the wife, the payment of some sums of money due to her, from estates which De Flores represented. This cause had at several times abated by the death of parties, and been revived, and, in 1743, De Pinna, the plaintiff, had been discharged as an insolvent debtor, and Alvarenga had been appointed his assignee; upon which, a supplemental bill had been filed, and several further proceedings had been had, upon which the present bill of revivor and supplement was filed.

To this bill the defendant pleaded, that, on the 13th January, 1753, after the death of De Flores, by a decree of the Prerogative Court of Canterbury, it had been decreed, that a commission of appraisement and monition should issue, on affidavits of De Pinna and Alvarenga, of a debt due from De Flores to the estate of De Pinna, to the amount of 585*l.* 5*s.*, for which he had received no satisfaction; and that afterwards there was an appeal *from that decree by the executors of De Flores, [*71] and the decree affirmed upon that appeal; and that, afterwards, the acting executors of De Flores tendered and left in the registry of the ecclesiastical court, the sum of 585*l.* 5*s.*, in full satisfaction of the debt sworn to be due from the estate of De Flores to that of De Pinna; and that Alvarenga, by his proctor, applied for and received that sum, and gave a receipt for the same as follows: "Franco and Franco against Alvarenga. Received this 23d December, 1754, of Mr. William Legard, Mr. Peter St. Eloy, and Mr. Henry Stevens, deputy-registers of the Prerogative Court of Canterbury, the sum of 585*l.* 5*s.*, being the same sum which, on the 10th day of July last, was tendered by Mr. Henry Farrant, proctor in the said cause, for Ab. Franco and Jacob Franco, executors of Daniel De Flores, otherwise De Prado, deceased, in full satisfaction of a debt sworn by Isaac Lusitano de Pinna, and me, the underwritten, Moses Alvarenga, in our

(1) See Beames, Elem. Pleas, 201, &c.

joint affidavit exhibited in the said cause, to have been due from the said Daniel de Flores, otherwise De Prado, to the said Lusitano de Pinna; and assigned over, in pursuance of an act of insolvency, to me the said Moses Alvarenga, for the use of himself and others the creditors of the said Isaac Lusitano de Pinna, and which, being on that day refused to be taken by my proctor, was there left in the said registry, by the said Henry Farrant, as a deposit for the payment of the said debt: and which since, to wit, on this day, has been, at my petition, decreed to be delivered and paid out of the said register to me the said Alvarenga; I say, received of the said deputy-registers, the said sum of 585*l.* 5*s.*, pursuant to the said order or decree of the said court, in full of the said tender and deposit so made in the said registry. Moses Alvarenga." And the plea further stated, that De Pinna and Alvarenga had no claim on the estate of De Flores, save in the right of Maria Agnes de Pinna, the first wife of Isaac Lusitano de Pinna, for which relief was sought by the original bill.

A plea, to the same purpose as the present, had been put in by the Francos, as executors of Daniel Flores, in a former stage of the cause, and was overruled 23d November, 1757.

Mr. *Mitford*, and Mr. *Steele*, in support of the plea, contended that the 585*l.* 5*s.* was taken out by Alvarenga, in full of his and De Pinna's [*72] claim upon the estate of Flores, as representing *that of the Monfortes; that the tender being in full satisfaction, the receipt of it must be so likewise; that it was, therefore, as good as any other release, and must be a bar to any suit by the representatives of De Pinna and Alvarengo, who had no other claim on the estate of De Flores but as representing Maria Agnes de Pinna.

LORD CHANCELLOR said, he doubted whether it was possible to put this interlocutory proceeding on a foot with their having filed a bill and obtained a judgment for this debt, which would have been in full. If they had made this claim *in foro contentioso*, and recovered this sum, they could not possibly have come with any further demand, (2) but must have set forth some fraud, mistake, or surprise; but an interlocutory proceeding can never be brought up to a judgment in the cause. (a)

He also thought that a defendant, in a bill of revivor, could not plead a plea which had been before pleaded by the original defendant, and overruled. (b)

Plea overruled, and ordered to stand for an answer.

(2) Vide Beames, Elem. Pleas, 200, 201, &c.

(a) As to pleas of judgments of courts having full jurisdiction, see Story, Eq. Pl. ch. 14, § 780-782; Standish v. Parker, 2 Pick. (2d ed.) 22 and notes (1) (2) (3) and cases cited; 1 Phil. Ev. (Cowen & Hill's ed.) Pt. 2, ch. 2, p. 320, et seq; 1 Stark, Ev. (5th Am. ed.) [226], 199.

(b) 1 Hoff. Ch. Pr. ch. 11, § 6, p. 389; 1 Smith, Ch. Pr. (Am. ed.) 229; 2 Madd. Ch. Pr. (4th Am. ed.) 536.

HALES v. SHAFTO.

[Vide S. C. (shortly before) 1 Ves. jun. 86.] Lincoln's-Inn-Hall, 13 March.

(No Entry.)

Goods sequestered on mesne process not to be sold. (1)

THIS was a sequestration upon mesne process. Mr. *Solicitor-General* moved for leave to sell the goods taken on the sequestration; but Lord Chancellor refused the motion; a sequestration on mesne process being only to found the further process of taking the bill *pro confesso*, *Gibson v. Scevington*, 1 Vern. 284, and *Desborough v. Crumby*, 1 Barnard. 212, (2) were referred to. (a)

See *Wilcocks v. Wilcocks*, Ambler, 427.

(1) An obvious distinction exists between sequestrations ordered on mesne process, and such as issue to enforce payment of a duty decreed. Much uncertainty, and some misunderstanding prevailed, however, for some time; but, whatever may have been the practice in ancient times, it seems in the result to have been settled, upon sound reasoning, that goods, &c. cannot be sold under a sequestration in mesne process; and, indeed, that an order for a sequestration itself in mesne process should scarcely be executed; since, without enforcing it, the party can have the effect of his suit, a decree upon the footing of it, very promptly. For the reasoning, and some cases on this subject, see Mr. Dickens's able exposition in *Rowley v. Ridley*, 2 Dick. 622, 625, 626, &c. For the misconceptions, &c. as to that distinction, see the report of Lord Hardwicke's judgment in *Wharam v. Broughton*, 1 Ves. 184; *Shaw v. Wright*, 3 Ves. 23; compared with *Wilcocks v. Wilcocks*, Ambler, 421; *Simmonds v. Lord Kinnaird*, 4 Ves. 735, &c. &c. In favor of the distinction so forcibly shown by Mr. Dickens, besides the cases adduced by him, see the principal case in 1 Ves. jun. 86, and the more modern one of *Knight v. Young*, 2 Ves. and Beames, 184; Vide also *Cavil v. Smith*, post, 361, and the notes. { *Mitchell v. Draper*, 9 Ves. 208. See further, upon Sequestration, *Walker v. Bell*, 2 Madd. 21; *Dunkley v. Scribner*, ib. 443; *Lowten v. Colchester*, 2 Meriv. 395. }

(2) *Desbrow v. Crommie*, Bunbury, 272.

(a) 1 Hoff. Ch. Pr. ch. 3, § 10, p. 146, and note (1), and cases considered, ib. 147 et seq.; 1 Smith, Ch. Pr. (Am ed.) 186, 187; 2 Madd. Ch. Pr. (4th Am. ed.) 205, 206.

**CODD v. WOODEN*. Lincoln's-Inn-Hall, 14th March. [*73]

(Reg. Lib. 1789. A. fol. 202. b.)

The practice of a court of law, compelling a plaintiff on a bond, not to take execution beyond his real debt, does not oust the jurisdiction of this Court in awarding an injunction. (1) Demurrer to a bill, on that ground, overruled.

CODD, the plaintiff, being indebted to several persons, by deed, in 1769, assigned over real and personal estate to trustees, in trust to pay to himself and his wife an annuity, and out of the surplus to pay debts, with the interest then due, proportionably, but the debts to bear no subsequent interest; and the creditors covenanted not to prosecute any suits for their debts, and to pay the surplus to Codd. The defendant had not signed this deed, but had accepted payments under it; and, after the account taken, payment of the debts, with the interest due at the

(1) So likewise in the case of lost bonds, the recently assumed jurisdiction of courts of law will not preclude a party from the more ancient and more beneficial relief of a court of equity. See per Lord Eldon C. in *Ex parte Greenway*, 6 Ves. 812, &c.; *Bromley v. Holland*, 7 Ves. 20; and in *E. I. C. v. Boddam*, 9 Ves. 466, &c. &c. { See *Atkinson v. Leonard*, post, 218, and note. }

time of making the deed, and the actual payment of the surplus, the defendant brought an action on the bond, in order to recover the subsequent interest; on which the plaintiff filed his bill for an injunction, insisting that the defendant, having asked and received payment under the deed, was bound by it: to this bill the defendant put in a general demurrer.

Mr. *Lloyd*, in support of the demurrer, insisted that the deed, being purely for payment of the debt and interest previous to its date, did not affect the subsequent interest, for which only they had brought their action; and that the courts of law would prevent their taking out execution for more than the actual debt, although they were obliged, in order to recover that, to bring their action upon the bond: that this bill was, in fact, only a bill for a discovery whether the defendant here had agreed only to take interest to the time of the deed.

Lord CHANCELLOR overruled the demurrer as too wide, because, although the court of law would prevent their taking out execution beyond their just debt, that did not take away the jurisdiction of this Court as to an injunction. (1) (a)

(1) See note (1) in the preceding page.

(a) See as to the jurisdiction of courts of equity, in cases where there has been a remedy assumed at law, over matter formerly relievable only in equity, *Hawley v. James*, 4 Cowen, 717; *Varet v. N. Y. Ins. Co.* 7 Paige, 560. See further, on the subject of Jurisdiction, *Hoare v. Contencin*, 1 Bro. C. C. 23, note (a) and cases cited.

LITTLEHALES v. GASCOYNE.

Lincoln's-Inn-Hall, 14th March, [and 28th April.]

(Reg. Lib. 1789. B. fol. 388.)

Executor keeping the money of testator longer than the exigencies of his affairs require, shall pay interest. (1) But one executor shall not be answerable for the sums come to the hands of another, unless they have done joint acts. But each shall be liable to the whole costs. (2)

THE defendants, executors of the late Sir Crisp Gascoyne, having kept very large sums of money in their hands ever since his decease in [*74] the year 1761, the Lord Chancellor, on the 3d of February last, ordered them to pay interest for the same, (3) saying, that an executor's paying or not paying interest, depended on its being necessary for him to keep the money to answer the exigencies of the testator's affairs or not; but that, where he held the money longer than was necessary, he must answer interest. And the cause coming on again this day, and the balances appearing very large, and great delays, and the interest exceeding the principal, they were ordered to account for the same. Mr. Hardinge pressed that, one of them having become insolvent, the other executor might answer the sums come to his hands, charging him with being a partner in the delay; but the Lord Chancellor refused this, as never done, except where executors joined in receipts, or

(1) See *Franklin v. Frith*, post, 433; and the notes to *Newton v. Bennet*, ante, 1 vol. 359; *Perkins v. Baynton*, *ibid.* 375, and *Treves v. Townshend*, *ibid.* 384.

(2) See 11 Ves. 61, 62, with the references, and *ibid.* 581, 582, 583.

(3) Reg. Lib. 1789. B. fol. 213.

did other joint acts, (4) but ordered them both to be liable to the whole costs.

(4) Vide *Sadler v. Hobbs*, ante, 2 vol. 114; and the notes. } And *Scurfield v. Howes*,
post, 94; 2 *Williams*, Ex. Pt. 4, Bk. 2, ch. 2, § 2, p. 1115, et seq. }

MUSSEL v. MORGAN. Lincoln's-Inn-Hall, 17th April.

(No Entry.)

A decree, though obtained by fraud, cannot be set aside by petition. (1)

THIS was a petition by Ebenezer George Nicholas Bryan Mussel, to have the decretal order pronounced in this cause, the 18th Feb. 1775, discharged, as obtained by collusion, and for other purposes.

The petition stated, amongst other things, that John Curtis, as next friend to the plaintiff, filed a bill in his name, he being then an infant, against the defendant Morgan and others, stating the will of George Mussel, petitioner's grandfather, whereby he "devised to his wife Elizabeth Mussel, certain messuages in Cullum Street and elsewhere, for life, remainder to Ebenezer Mussel (petitioner's father) for ninety-nine years, if he should so long live, remainder to the heirs of the body of his said son Ebenezer lawfully begotten; and declared it to be his will, that the premises should not descend entirely to the eldest son of his said son Ebenezer, if he should have any other child or children of his body, lawfully begotten, living at the time of his decease; but that his son Ebenezer might, at any time during his life, by his last will and testament in writing, or by any other deed or writing by him to be executed in the presence of three or more credible witnesses, devise, limit, direct or appoint the said messuages, &c. unto, or for the benefit of, all his children as should be living at his decease, and to the several *and respective heirs of their bodies, lawfully issuing, in such [*75] parts and proportions, and in such manner as his said son Ebenezer should think fit: and if it happened that his said son Ebenezer should die without having made any such will or disposition of the premises, then his will was, that the said messuages, &c. after the several deceases of his said wife and son, should come to all and every the sons, if more than one, of the body of the said son, to be equally divided amongst them; and if there should be but one such son, then he gave and devised the same to such only son, and the heirs of the body of such only son lawfully issuing, with divers remainders over in default of such issue;" and stating that about the year 1733, George Mussel died, leaving his wife and son surviving him; and the wife entered, and died in 1741; that Ebenezer, petitioner's late father, then entered, and died about 1764, without having executed his power of appointment, leaving Sarah, the petitioner's mother (then the wife of the defendant Gretton, and since deceased) his widow, and the petitioner and Elizabeth Morgan (late wife of defendant Morgan, and daughter of the said Ebenezer by his former wife, and also since deceased), his only children: and that on the death of Ebenezer, his father, the petitioner, by virtue of his grandfather's will, hoped an entry would have been made for him, and the rents received and laid out for

(1) See Mr. Beames's edition of the Orders in Chancery, p. 1, &c. with the notes.

his benefit ; but the bill charged, that the defendant Morgan had got into possession of the premises under pretence of a settlement on his marriage with the daughter of petitioner's late father ; and the bill, therefore, prayed that the defendants might produce all deeds, instruments, and memorials in writing relative to the estate, and might account for rents, &c., and that what might be coming from the same, might be laid out for the plaintiff's benefit until he should attain twenty-one, and then the funds should be assigned to him ; and for a maintenance in the meanwhile : that the defendants put in their answer, and particularly the defendants Thomas Wilkins Morgan, and Elizabeth Mary Wilkins Morgan, his daughter, stated that in the year 1752, a marriage being proposed between the defendant Thomas Wilkins Morgan and Elizabeth, then the only daughter of Ebenezer Mussel, defendant, informed Ebenezer that he was possessed of an estate of 2000*l.* per annum, given him by his grandmother, on condition that he should not marry any woman with a less fortune than 4000*l.*, and that Ebenezer represented, that his daughter would be entitled to about 1000*l.* per annum real estate, and that [*76] he meant to give up about 800*l.* a year : and proposals having *been made, a settlement was entered into by which Ebenezer and Elizabeth Mussel conveyed the estates devised by said George Mussel to a trustee, in order that a recovery might be suffered, and the premises settled to the use of Ebenezer and his heirs, till the marriage, remainder to trustees for ninety-nine years, if Ebenezer should so long live, to raise an annuity for him, and suffer the defendant to receive the surplus rents for life, remainder to defendant Thomas Wilkins Morgan for life, *sans* waste, remainder to the wife for life, remainder to the issue of the marriage, remainder to the wife in fee, and Ebenezer thereby released the power of appointment : that the recovery was accordingly suffered, and that there being some doubts about the construction of testator's will, in case Ebenezer should have any after-born child, Ebenezer gave defendant Thomas Wilkins Morgan a bond in the penalty of 8000*l.*, to pay the sum of 4000*l.*, in case he should have any other child besides the said Elizabeth : that Thomas Wilkins Morgan entered into possession of the premises, and that defendants Thomas Wilkins Morgan, and Elizabeth Mary Wilkins Morgan (his daughter by said Elizabeth his wife), claimed by the settlement and recovery : that the defendants Thomas Wilkins Morgan, and Elizabeth Mary Wilkins Morgan (by her next friend), filed their bill in 1769, against the defendant Gretton and Sarah his wife (widow and executrix of Ebenezer Mussel), stating the settlement, and insisting that, in case the petitioner was entitled under the will of George Mussel to the estates in question, the defendants, the Grettons, ought to make them satisfaction for 4000*l.*, and for two legacies released to said Ebenezer Mussel by said Elizabeth by the marriage settlement, out of the real and personal estate of Ebenezer ; and praying that the settlement might be established, and that the Grettons and the plaintiff might be restrained from bringing any ejectment for recovery of the premises ; but if the Court should be of opinion that the settlement was void, then praying an account, and that the bond and legacy might be paid. That the causes were heard 15th February, 1774, before the then Master of the Rolls, when his Honor ordered, that the petitioner's bill should be retained for twelve months, and that he should be at liberty to proceed at law for recovering possession of the estate in question ; and in default of proceeding, his bill should be dismissed with costs : but in case he should proceed to trial, his Honor reserved costs and further directions till after the trial ;

and the other cause was to stand over in the mean time: that in pursuance of this order, an ejectment was brought by the *plain- [*77] tiff, in the King's Bench, to which defendant Morgan was made a defendant, and the same was tried at the sittings, in London, after Easter, 1774, before Lord Mansfield, and a verdict found for the plaintiff, subject to the opinion of the Court, on a case which was reserved, with liberty to enter up a verdict for defendant, if the Court should be of opinion the plaintiff had no right to recover: that the case stated the will of George Mussel, his death, the entry and death of his widow, the entry of Ebenezer, and his having issue by his then wife, Jane Elizabeth, born during the life of testator's widow; the indenture of lease and release and recovery; the marriage of defendant Morgan; and that Ebenezer afterwards married said Sarah (then Sarah Stevens), and had issue by her the petitioner; and the death of Ebenezer: that defendant Thomas Wilkins Morgan's wife died in 1765, leaving issue two daughters, one of whom was since dead; and that defendant Morgan claimed under the settlement and recovery, and the petitioner under the will of his grandfather; that the case was argued in Trinity term, 1774, and then stood over for further argument in Michaelmas term; in which term (as petitioner had lately discovered) a rule was made for entering judgment for the defendant: that the causes having been set down on the equity reserved, came on at the Rolls 15th February, 1775, when his Honor ordered the petitioner's bill to be dismissed without costs, and established the settlement in the second cause: that the petitioner attained twenty-one years of age, 28th March, 1785, but had been obliged to reside abroad since that time: that the petitioner, 4th April, 1789, made an actual entry on the premises, and brought an ejectment to recover the same; which coming on to be tried, it appeared, that the demise was laid prior to the entry, on which account the nominal plaintiff was nonsuited: that Elizabeth Mary Wilkins Morgan having attained her age of twenty-one, Thomas Wilkins Morgan and she, as of Trinity term, 1777, levied a fine of the premises; and afterwards, she having intermarried with Ely Bates, they, about May, 1789, filed their bill against the petitioner, stating that the case had been argued in Trin. 1774, and again in Mich. 1774, when judgment was given for defendant Morgan, and praying to have the benefit of the decree of 15th February, 1775, and to be quieted with respect to plaintiff's claim, and for an injunction to restrain the petitioner from proceeding at law. The petition further stated, that the petitioner was ignorant of the rule for entering *judgment for de- [*78] fendant Morgan, in the action brought in 1774, or of the decretal order in 1775, till after he had brought his ejectment in 1789; but had found, on searching the office of the Clerk of the Rules, that the same had been by consent of counsel for petitioner as lessor of the plaintiff, and of said defendant; and that, from other circumstances, he is satisfied that the judgment and decretal order were obtained by collusion, between said Curtis and defendant Morgan; and that he understands, that on the arguments in Trinity term, 1774, the Court had great doubt as to the construction of the will, and directed counsel, in the interim, between that and the second argument, to look into cases; and that, in the mean time, the suit was compromised between Curtis, his next friend, and defendant Morgan upon the terms, that judgment should be entered up for the latter, and that he should pay the costs; and that the rule was obtained in consequence of that agreement: and that he apprehends that the defendant Gretton connived thereat, as, in case petitioner obtained

judgment in his favor, Gretton and his wife might be liable to pay the defendant Morgan the sum of 4000*l.*, and other sums, with interest, out of the assets of the petitioner's father Ebenezer Mussel: the petitioner therefore prayed that the decretal order might be discharged, and the petitioner be at liberty to apply to the Court of King's Bench to have the judgment set aside, and the case reargued; and that the defendant Morgan might be ordered to consent thereto, and the trial in the ejectment stayed till after the judgment of the Court of King's Bench should be obtained on the case. The petition was supported by affidavits.

Mr. *Mitford*, and Mr. *Hollist*, in support of the petition, argued — that this was the proper way of getting rid of the decree; that in the present case, it could not be by bill of review, because the decree was not inrolled. That it might be by rehearing, but that was prevented by the judgment in the King's Bench. Though no case had directly decided that a decree could be set aside on petition, yet in *Sheldon v. Fortescue*, 3 Williams, 104, the Lord Chancellor admitted that even a decree, much more an interlocutory order, if gained by collusion, may be set aside on a petition, *a fortiori*, by bill. But in all the cases where there has been a second bill, there has been more to do; not merely to set aside what has been done. Although the present case is in a state for a rehearing, that could go no further than the judgment on the [*79] *record, and the collusion could not appear; and we cannot apply, without leave, to the Court of King's Bench, to set aside their judgment. If a third person is injured by collusion, he may file his bill; but where it is the plaintiff, he can only apply by petition; and even in the case of a third person, it must be where he has an equitable right. The present petitioner having a right to rents and profits, his bill was retained only on account of his being an infant; but would not have been so, had he been adult, without trying his title at law: therefore, at present, under a new bill, he must be put to a fresh ejectment, to find the same facts which are found already; and upon which, by removing the judgment and decree out of the way, the question of the construction of the will, may be argued without further expense of a new finding of the same facts. There is a case in 1 Williams, † where a decree was pleaded to a fresh bill and the plea overruled. In a case in ‡ Atkyns, Mr. Yorke lays it down, that a decree may be set aside, on petition. (3)

But Lord CHANCELLOR refused the prayer of the petition, saying there was no instance hitherto of its being done; and that he could not see a reason why it should not be by an original bill, in the nature of a bill of review. Either there is enough before the Court already, for it to determine upon, or not; if there is, it may be done by a rehearing; if not, the new matter must be brought before the Court, (3) (a)

† *Richmond v. Tayleur*, 1 Williams, 734.

‡ *Wortley v. Birkhead*, (2) 3 Atk. 809. See the case of *Bradish v. Gee*, Ambler, 229.

(2) Mr. Brown was mistaken in referring to the case in Atkyns. It seems the one alluded to was the dictum in *Sheldon v. Fortescue* Aland, 3 P. W. 111. Such position, however, seems clearly wrong. Vide Ord. Ch. edit. Beames, p. 1, &c.

(3) See the notes in Mr. Beames's Ord. Ch. p. 1, 2, 3; especially *Perry v. Philips*, 17 Ves. 173.

(a) *Story*, Eq. Pl. ch. 8, § 426; 1 Madd. Ch. Pr. (4th Am. ed.) 800; *Manaton v. Molesworth*, 1 Eden, 18; *Kennedy v. Daly*, 1 Scho. & Lef. 355; *Perry v. Philips*, 17 Ves. 173.

Ex parte MORRIS.

Lincoln's-Inn-Hall, 20th April. [Vide S. C. 1 Ves. jun. 132.]

Bankrupt's estate shall pay interest, when sufficient, (1) without breaking in upon his allowance. [But no compound interest allowed.] (2)

THE bankrupt's estate being sufficient for the purpose, Lord CHANCELLOR gave the creditors interest (1) for such of their debts as bore interest; but said, he would not have done so, if it broke in upon the bankrupt's allowance. See *Bromley v. Goodere*, 1 Atk. 75.

(1) Subsequent to the time of suing out the commission. See the report in 1 Ves. jun. 132, et vide *Ex parte Champion*, post. 436; *Ex parte Hankey*, post. 504, and S. C. affirmed by Lord Loughborough C. *Ex parte Mills*, 2 Ves. jun. 296.

(2) See the report, 1 Ves. jun. 132.

*EASTER TERM.

[*80]

30 Geo. 3.-1790.

JONES v. JONES.

(Reg. Lib. 1789. A. fol. 289.)

Motion, that securities be delivered to the executor, to receive the money, granted.

THE testator devised lands, and also ordered his personal estate to be laid out in land, and settled to uses under which the defendant took an estate for life only, with remainder over; and appointed the plaintiff executor. The defendant possessed himself of the personal estate, and, amongst other things, of securities for money. The plaintiff filed his bill, and the securities were ordered to be deposited. Some of the debtors being desirous of taking up their securities.

Mr. Richards moved, on the part of the plaintiff, that the securities might be delivered up to him, in order to receive the moneys secured by them; which was slightly opposed by Mr. Lloyd, counsel for the defendant; but it was ordered; and that the plaintiff should [pay] the money [when received by him] into the bank.

BUTLER v. EVERY. (1) [S. C. 1 Ves. jun. 136.]

(No Entry in Reg. Lib. upon this occasion.)

Plea of a fine of lands in the county of Derby, and elsewhere, with averment that it was of all the lands, sufficient, though it had no averment that the party had no lands but in Derbyshire.

THIS was a bill by persons claiming as heirs *ex parte maternâ* of the late Sir John Every, Bart., stating that he died in the year 1779, intestate,

(1) The exact nature of this plea (which was drawn by Lord Manners, the present Lord

but that Edward Every took possession of his estate, pretending to be heir *ex parte paternâ*.

[*81] *To this the defendant pleaded, that after the death of Sir John, Edward entered, claiming as heir-at-law, and took the title of Sir Edward Every, Bart.; and in Michaelmas term, 1780, levied a fine of the lands in the county of Derby and elsewhere; the plea stated that the due proclamations were made, and that no claim was made in due time by the plaintiff. And it further averred that the fine was levied of all the lands which belonged to Sir John Every, and stated the death of Sir Edward Every, in 1785, by which the estate had descended to the defendant.

Mr. *Mitford*, and Mr. *Johnson*, for the plaintiff, objected to the plea as insufficient, as not setting forth that fines were suffered of all the estates; the word *elsewhere* implying that the lands lay in other counties besides Derbyshire, and no fine being stated to have been levied in any other county, which would be necessary, as a fine levied in one county, could not affect lands situate in another. That, in this case, Sir John Every had advowsons in gross; and that though the plea alleged entry, it did not allege that there had been any presentation, without which there could be no seisin of the advowsons; therefore, the plea being entire, and being in part bad, must be wholly overruled.

Mr. *Mansfield*, for the defendant, in support of the plea, said the bill had not stated that there were any advowsons in gross; and that it could not be implied from the fine, which was only of general descriptions, that there were any; but that the plea averring that the fine was of all the lands of Sir John Every, that was sufficient, though it did not expressly aver, that he had no lands out of Derbyshire.

And Lord CHANCELLOR thinking this averment sufficient, and that he could not intend, from the fine alone, that there were advowsons in gross,

Allowed the plea.

Chancellor of Ireland, when at the Bar), may be seen from that in *Dobson v. Leadbeater*, 13 Ves. 231, which was transcribed from the record of it by the late Sir Samuel Romilly. It seems, that the plea in the principal case ought to have been overruled, since it did not contain any positive averment of the party's actual seisin. Editor's MS. note, on *Dobson v. Leadbeater*, 13 Ves. 230-234, and Mr. Vesey's note. ¶ Vide also 2 Atk. 630. { 2 Madd. Ch. Pr. (4th Am. edit.) 316, 317. } In *Dobson v. Leadbeater*, leave was given to amend, as had been done in *Page v. Lever*, 2 Ves. jun. 450. { As to amending, see *Newman v. Wallis*, 2 Bro. C. C. 143. }

[*82] *HOCKLEY and Wife v. MAWBEY. [12th May.]

[Vide S. C. 1 Ves. jun. 143.]

(Reg. Lib. 1789. A. fol. 568. to 570.)

Devise of real and personal estate, to the wife for life, remainder to testator's son, R. R. and his issue, lawfully begotten, to be divided as he shall think fit; and if he should die without issue, remainder over, held to be an estate for life only, with a power, and the remainder over good. (1)

JOHN RUSSEL, by will, dated 2d January, 1758, devised as follows:
"I do hereby order and direct my executors hereinafter named to lay

(1) See the report in 1 Ves. jun. 143.

out the sum of 2000*l.* out of my personal estate, in the purchase of a freehold estate, within twelve months after my decease; and when the same shall be purchased, I give, devise, and bequeath the same, and every part thereof, unto my wife Rebecca Russel, for and during the term of her natural life. Also I give and bequeath unto my said wife, all those my freehold messuages in Johnson's Court, near Fleet Street, Nos. 2, 4, 5, 6, which were purchased in the name of my son, but are my property, as appears by a declaration of trust from him to me made; and also all those six messuages or tenements, being freehold, situated in Raven and Sun Yard in Bermondsey aforesaid, and the reversion of seven more there, which will descend to me in about twenty years: which last-mentioned estate was likewise purchased in the name of my son, but are also my property, as appears by another declaration of trust from him to me made; to hold unto my said wife, all and singular the said premises for and during the term of her natural life; also, I give and bequeath unto my said wife all my leasehold estates for and during her natural life; and from and immediately after her decease, I give, devise, and bequeath the same, and every part thereof, unto my son Richard Russel, and to his issue, lawfully begotten, or to be begotten, to be divided amongst them as he thinks fit; and if my said son shall happen to die without issue lawfully begotten, my will is, that as well my present freehold and leasehold estates, as the estates hereby directed to be purchased, shall be sold, and the money arising therefrom shall be equally divided between my brother Thomas Russel's children, my sister Willet's children, and my sister Parker's children. And my will and desire is, and I hereby order and direct, neither the estate directed to be purchased, nor any of my present freehold or leasehold estates may be sold or disposed of during the life of my wife or her son: and all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, after payment of my just debts, funeral expenses, and the above legacies, I give, devise, and bequeath the same, and every part and parcel thereof unto *my said wife, to and for her own use and benefit forever. [*83] And I do hereby nominate, constitute, and appoint my said wife sole executrix of this my will."

John Russel died in December, 1770; Rebecca Russel survived him, and entered upon and possessed the estates, both real and personal, but never laid out the 2000*l.* according to the directions of the will, and died in 1780. Then Richard Russel, the son, came into possession, and died in the year 1784, having bequeathed his estates to the defendant Mawbey and others upon trust. He never had any issue.

The bill was filed by the plaintiffs, in right of the wife, who was the widow, and personal representative of John Russel, who was one of the children of Thomas, the brother of the testator named in the will, praying that the 2000*l.* might be answered out of the assets of Rebecca, and that the estates devised by the will to be sold, might be sold, and the produce thereof, and the 2000*l.* distributed amongst such of the children of the testator's brother Thomas, and his sisters, Willet and Parker, as were still alive, and to the personal representatives of those who were dead.

The decree directed, among other things, an inquiry whether the 2000*l.* had been laid out in land, according to the will; and also, that the Master should inquire and state what freehold and leasehold estates the testator John Russel was seised and possessed of at the time of making his will.

The Master, by his report, certified, that the 2000*l.* had not been laid out; that the testator had other freehold estates besides those specified in his will.

The cause came on now for further directions, when two points were made:

1st. Whether the words *present* estates, meant all the estates of which the testator was then in possession, or the enumerated estates only.

2d. Whether the devise to the brother's and sister's children, was, or was not, too remote, as depending on the son's dying without issue.

[*84] *Mr. *Mansfield*, and Mr. *Lloyd*, for the plaintiff, and for defendants in the same interest, contended that by his present estates, the testator must have meant all the estates of which he was then possessed. There is nothing to restrict the sense of the word *present*. It is contradistinguished to the estates to be purchased.

2dly. This is not an estate tail in *Richard*, but an estate for life. It is a contingency with a double aspect; to the issue, if any, but if he died without issue, then over. The words, without issue, must mean issue living at the death. This sense of the words is aided by the subsequent words, for if he dies without issue it is to be divided; the division is to be at his death; with the additional provision, that it shall not be during the life of testator's wife. The division among the brother's and sister's children, must be equal. If there was one child only, that child would take. *Davy v. Hooper*, 2 Vern. 665; *Madoc v. Jackson* (antea, vol. ii. p. 588); *Wilson v. Vansittart* (Ambler, 562).

Mr. *Solicitor-General*, and Mr. *Schoyn*, for defendants. By the words *present* estate, he must mean the enumerated estates, which he has given to the wife for life. He had other estates, of which he made specific devises in form; and he had estates which he meant to be subjects of the residuary devise. He certainly meant the word *present* to be contradistinguished, not to the estate to be purchased only, but the estates not enumerated.

2dly. Then the gift over upon dying without issue, is too remote, being after an estate tail. It cannot be contended that *issue* here meant *children*. The testator was clearly aware that it had a more extensive sense, and clearly meant the brother's and sister's children should not take but in a more remote event. Suppose the son had left no child, but had left grandchildren, or great-grandchildren, certainly they would have been objects of his power, and he might have appointed among them all. Then the issue, though ever so remote, being within the power, these words cannot be restrained to mean children only. There is no case where a remainder has been held to be good, after the word *issue*, generally. The words used here are not satisfied by saying, he has a life estate with power to dispose; for he must take an estate tail; and the power given [*85] him to divide will not prevent *his taking an estate tail. Here are no words to restrain the *issue*, to issue at the time of his death, as there have been, in all the cases, when such construction has been given, such as the word *leaving*, &c.

LORD CHANCELLOR (2).—The principal question is, what estate the son took in the enumerated estates: and I think the testator intended, and has expressed his intention of giving, a contingency with a double aspect; in one event, a gift to the children of the son, if he should have any, and if he should not have any child, that then the estate should be sold for

(2) See a much more full report of the judgment, &c. in 1 Ves. jun. 149, &c.

the purposes in the will. He did not mean the estate to go as an estate tail, but that the children should take distributively; in which case they must take as purchasers; and the consequence is, that Richard took only an estate for life. (a) He had a power to divide; but if he did not so, there was an interest in the children that would entitle them to an equal division. (b) It is observed, that if he had no children, it would go to grandchildren; it would so, but only as descriptive of his power: in order to take they must be alive at the death of Richard: it is not sufficient to say that they are the immediate descendants of Richard, to make them take under the estatetail. It is sufficient that the division must take place at the death of Richard, which is within the rules. Therefore, two events were provided for: 1st. There being children of Richard; in which case they would take: 2dly. There being no children; in which case the estates vested in the persons described. 3dly. Then as to what estates passed. The word *present* may be taken in opposition to the estates *to be purchased*; or it may mean all he could devise: but here it receives a different construction from the other contents of the will. The word is not of force sufficient to control the former gifts, and receives a construction from the residuary clause, which it could not be meant to defeat. It cannot extend further than the enumerated estates.

By the decretal order it is declared, that according to the true sense and meaning of the will, the estates to be sold under the devise are the freehold estates there enumerated, and all the leasehold estates; (3) and that the other freehold estates not enumerated in the will, pass thereby to Rebecca Russell; and it is ordered that the estates, devised to be sold, should be sold accordingly, and the money to be paid into the *bank. [*86] And it is declared, that the money, so to be paid, will be devisable according to testator's will, in equal shares among his brother Thomas Russell's children, his sister Willet's children, and his sister Parker's children living at the time of the death of the testator: and the master was to inquire, what children they had living at the death of testator, and which of them are dead, and whether they left any, and what personal representatives.

(3) "And no other." — R. L.

(a) There have been several cases in which words which would otherwise have been words of limitation, have been holden to be words of purchase, in consequence of there being a direction that the heirs or issue, &c., should take as tenants in common, or in some mode incompatible with the regular course of descent. *Doe v. Laming*, 2 Burr. 1100, 1 Bl. Rep. 265; *Doe v. Lyde*, 1 T. R. 697; Mr. Justice Buller's observations, *Doe v. Goff*, 11 East. 668; *Doe v. Jesson*, 6 M. & S. 95. It is singular, that the present case should not have been cited either by Mr. Fearn, or by the very learned persons who argued the two last of those cases. There is also a case respecting a limitation of personal property (*Wilson v. Vansittart*, Amb. 662), where a similar construction was adopted by the Court; *King v. Burchell*, Amb. 378 (and from Lord Northington's MSS.; 1 Eden, 424); where the limitation was to A. for life, remainder to the issue male of A. and to his and their heirs, share and share alike, was a determination to a contrary effect; but his Lordship's opinion was grounded upon the general construction of the will, and particular expressions, denoting the intent of the testator, that this was an estate tail in A., and not an estate for life. — *Eden*.

(b) See Sugden on Powers (4th Eng. edit.), 401 439, 440.

[*87]

*TRINITY TERM.

30 Geo. 3. 1790.

HUGHES v. HUGHES. [Vide S. C. 1 Ves. jun. 161.]

(No Entry.)

Order for a receiver to distrain. (1)

MR. SOLICITOR-GENERAL moved that the receiver appointed by the Court might be at liberty to distrain. He cited *Pitt v. Snowden*, 3 Atk. 750.

Order granted: the distress to be in the name of the persons having the legal estate. (1)

(1) If the order was so drawn up, it must have been for want of the tenant's attornment to the receiver. After attornment, a receiver can distrain in his own name, and on his own authority, without any special leave of the Court; and the order for the attornment of the tenants accompanies his appointment. See the Report in 1 Ves. jun., and vide 5 Burr. 2698, and 1 Ball. & Beatt. 483. That a receiver cannot bring an ejectment without previous leave of the Court, see *Wynn v. Lord Newborough*, in the next page, and 1 Ves. jun. 166, &c.

PEARSON v. BELSHER, [CHIER.] [9th June.]

(Reg. Lib. 1789. B. fol. 524. Entered *Pearson v. Wolfe*.)

Pauper shall not dismiss without costs.

MR. GRAHAM moved, on the part of the plaintiff in a pauper cause, to dismiss the bill against two defendants without costs.

But, Lord CHANCELLOR ordered it to be upon payment of costs. (1)

(1) It appears, however, from Reg. Lib. contra, that it was without costs. Upon the subject of Paupers, see *Wilkinson v. Belsher*, ante, 2 vol. 272; *Wallop v. Warburton*, 2 Cox, 409; *Frost v. Preston*, *Rattray v. George*, and *Corbett v. Corbett*, 16 Ves. 160, 232, and 407, with *Angell v. Smith*, Prec. Ch. 219, cited in *Frost v. Preston*, 16 Ves. 160. { *Spencer v. Bryant*, 11 Ves. 49; 1 Smith, Ch. Pr. (Am. ed.) 313. }

WRIGHT v. BRAINE. [23d June.] [S. C. 2 Cox, 232.]

(Reg. Lib. 1789. B. fol. 474. b.)

Injunction to stay execution and trial not to be granted on one motion. (1)

MR. PEMBERTON moved for an injunction to stay execution, and that it should also stay trial.

Lord CHANCELLOR said, they could not be granted as one motion, and therefore granted the first part alone. (1) (a)

(1) This is the established practice; but there seems one exception to it upon principle,

(a) See *Eden on Injunct.* (2d Am. ed.) 106 - 110; 1 Smith, Ch. Pr. (Am. ed.) 611, 612; *Madd. Ch. Pr.* (4th Am. ed.) 220.

which prevailed in the present case, although the fact is unnoticed both by Mr. Brown and Mr. Cox. The unavoidable exception seems to be in a case where the application is made on behalf of an executor, &c. to restrain proceedings at law, after there has been a decree for him to account in equity. It appears from the Reg. Book, that the motion in the principal case was under those circumstances; and in point of fact, that the Court did order all proceedings to be stayed; contrary to the above report and that of Mr. Cox. Vide R. L.

Upon the practice in common cases, see *Garlick v. Pearson*, 10 Ves. 450; *Appleyard v. Seton*, 16 Ves. 223, and the Editor's note to *Revet v. Braham*, ante, 3 vol. 640. Upon restraining proceedings at law after a decree to account, see the Editor's note to *Brooks v. Reynolds*, ante, 1 vol. 183.

*WYNN v. LORD NEWBOROUGH. [Vide S. C. 1 Ves. 164.] [*88]

(Reg. Lib. 1789. B. fol. 463. b.)

A receiver cannot proceed in ejectment. (1)

MR. MANSFIELD moved, on the part of one of the defendants, tenant in tail in remainder (there being no tenant in tail in being), and several tenants of the estate in question, against the receiver, who had been regularly appointed by the Court, to prevent his proceeding in ejectment against the said tenants. Mr. Richards, on the part of Lord Newborough, the tenant for life, suggested that his Lordship approved of the conduct of the receiver.

LORD CHANCELLOR held that the receiver's authority did not extend so far as to justify him in taking such a measure: but as the application of the tenants was ill-founded, they having no interest, in his opinion, to support the motion, he rejected it with costs.

(1) See also *Angell v. Smith*, 9 Ves. 335, &c. { *Anon.* 6 Ves. 287; 1 *Smith, Ch. Pr.* (Am. ed.) 638, 639; 2 *Madd. Ch. Pr.* (4th Am. ed.) 243, 244; 2 *Story, Eq. Jur. ch.* 21, § 833. }

Ex parte KENT. [30th July.]

(Reg. Lib. 1789. A. fol. 445.)

Maintenance allowed for a infant, though no cause in Court. (1)

UPON a petition for maintenance for an infant, there being no cause in Court, it was doubted by the register whether it could be done, and Lord Chancellor took time to consider of it. And this day, Mr. Abbot cited *Ex parte Whitfield*, 2 Atk. 315, where the same was done upon searching precedents, and Lord Chancellor made the order.

(1) Vide S. P. *Ex parte Salter*, post, 500, where many previous cases are collected.

BUTTRICKE, Widow, v. BRODHURST. [S. C. 1 Ves. jun. 171.]

(Reg. Lib. 1789. A. fol. 614.)

Widow having different interests, under her marriage settlement and her husband's will, and proving the latter, acting under it, and receiving the rents six years, held to have made an election.

THE plaintiff, previous to her intermarriage with her late husband, being seised of copyhold estate, and possessed of other property, and the husband being possessed of 3225*l.* 3 per cent. consol. by indenture June 16, 1783, he covenanted with trustees (in consideration of the marriage and of the plaintiff's fortune) to transfer 2000*l.* part thereof, in trust for himself, till the marriage, and afterwards to permit him to receive the interest [*89] for life, and after his decease to permit the plaintiff *to receive the interest for her life in lieu of dower, and after the decease of both, to pay and apply the 2000*l.* among the children at twenty-one, or if there should be but one child, then the whole to that one, and, in default of issue, to apply the whole sum to such persons, and for such uses, as the plaintiff by her will should direct, and in default of appointment to her representatives: and the plaintiff covenanted to surrender her copyhold estate to the use of herself till the marriage, and afterwards to the use of her husband for life, with remainder to such uses as he by will should appoint, and for want of such appointment to his right heirs.

The plaintiff made a surrender to the uses of the settlement, and the marriage took effect, but the husband never made the transfer.

On the 31st of August, 1784, the husband died, having first made his will, dated April the 10th, in the same year, whereby he devised to trustees, of whom one of the defendants is the survivor, all his estates, real and personal, in trust to pay certain annuities, and then to pay the residue of the rents and profits of his real estate, and the interest, and produce of his personal estate, to the plaintiff for life, *provided she did not marry again*; but in case she should marry again, or at her decease, then he gave the copyhold estate, surrendered by him, to one of the defendants, and the stocks to his sister, a defendant, for life, remainder to her son for life, with remainder over to another of the defendants, and appointed the plaintiff, his wife, executrix of the will.

The plaintiff proved the will, and had been ever since in the receipt of the rents, profits, and produce of the testator's real and personal estate, to the annual amount of 229*l.*, and out of it paid the annuities, but now filed her bill against the defendants to have the 2000*l.* 3 per cent. consol. annuities transferred upon the trusts of the settlement.

The defendants, by their answers, contended, that, by having proved and acted under the will, and received the benefit thereof, she had made her election, and had waived her interest in the 2000*l.* consol. annuities.

[*90] *Mr. *Solicitor-General*, for the plaintiff, contended, that the trustees having never acted, her receiving the rents was only an act of necessity, as there was no other person to receive them, and therefore could not bind her as an election. That in the case of the Duke of *Montagu* (Lord *Beaulieu* v. Lord *Cardigan*, Amb. 533, 6 Brown's P. C. 232), (1) there were much stronger acts to show an election, yet they were held insufficient.

Lord CHANCELLOR said, all that could be gathered from that case was, that an election may be kept open for fifty years. (2) That no line could be drawn from mere length of time, but it must be from circumstances showing the intent of the party; that he should think the receiving of the rents, much less the taking the personalty officially, could not bind; (3) but, under all the circumstances of the present case, the plaintiff filing her bill for a transfer of the stocks, without showing any ground, must be presumed to have made her election. (a)

Bill dismissed. (b)

(2) Lord Thurlow approved of Lord Northington's decision there, contrary to that in Dom. Proc. See also in *Wake v. Wake*, 1 Ves. jun. 336, *arguendo*. Et vide that case. { *Freke v. Barrington*, post, 274. }

(3) Vide *Simpson v. Vickers*, 14 Ves. 341, &c.

(a) In reference to the acts which show an election, see 2 Story, Eq. Jur. ch. 30, § 1097, 1098; *Page v. Hughes*, 2 B. Monroes, 442; *Dillon v. Parker*, 1 Clark & Fin. 303; S. C. Jacob. 505; *Brice v. Brice*, 2 Moll. 21; *Giddings v. Giddings*, 3 Russ. 241.

(b) See *Northumberland v. Granby*, 1 Eden, 489, and note.

BLOUNT v. BURROW. [22d June.]

(Reg. Lib. 1789. A. fol. 422.)

AN executor, who ought to have been a co-plaintiff, was made a defendant, and Lord Chancellor, for some time, doubted whether he was entitled to his costs; but at length ordered them to be paid to him. (a)

(a) See 2 Williams, Ex. Pt. 5, Bk. 2, ch. 2, p. 1252, 1253. See this case reported on the principal point in it, 4 Bro. C. C. 72.

SCURFIELD v. HOWES.

Rolls, May 19th, 21st; June [9th, 28th, and 30th.]

(Reg. Lib. 1789. B. fol. 649.)

Interest of legacy to A. for life, remainder to B. and C.; or, in case one should die, living A., then to the survivor: B. and C. both die in the life of A.: the legacy was vested, and went to the survivor. (1) A trustee, joining in a receipt and reconveyance of a mortgaged estate, though he does not receive the money, is liable, (2) and the receipt being in evidence, no inquiry can be directed as to the fact.

SARAH FOWLER being entitled to 500*l.* secured upon mortgage of lands in Rickmanworth, by will dated 9th July, 1762, directed her executors to permit her late husband's niece Susanna, the wife of Michael Homer, and her assigns, to take the interest arising from the said mortgage, for

(1) Vide *Browne v. Lord Kenyon*, 3 Madd. Rep. 410.

(2) It appears from Lord Redesdale's notes, that the present was thought a very strong case, and somewhat questionable for some time afterwards; but that at length its authority (depending on that of *Sadler v. Hobbs*, ante, 2 vol. 114,) became settled. Vide also per Lord Redesdale when Lord C. of Ireland, 1 Scho. & Lefroy, 341, 272, 273. The Editor begs to refer to his note to *Sadler v. Hobbs*, ante, 2 vol. 114; to that of Mr. Cox, in *Churchill v. Lady Hobson*, 1 P. W. 241, 243, &c. (5th edition.) See also *Harden v. Parsons*, 1 Ca. Lord North, 145, with Mr. Eden's note, 150.

[*91] her separate use, during *her life; and, if the said mortgage should be paid off, she directed the money to be laid out in government securities to the same use; and, after the decease of Susanna Homer, she gave the principal sum to the son and daughter of Susanna Homer, by her former husband Mr. Wright, equally between them, share and share alike; but if either of them should die before the decease of their mother, the whole to the survivor, and appointed Joseph Barnardiston, and the defendant Samuel Howes, executors.

The testatrix died 1766, and both the executors proved the will.

The only children of Susanna, by her former husband James Wright [who were living at the date of the will], were John Wright and Lydia Wright. Lydia intermarried with John White in 1767, and died in September, 1776, in the lifetime of her mother and brother, by which [as the bill insisted] John Wright became entitled to the 500*l.* subject to the mother's life-interest; and afterwards, in consideration of 130*l.*, assigned the same to the plaintiff Scurfield. John Wright afterwards went abroad, and died intestate, [in the lifetime of Susanna Homer,](3) and the plaintiff has obtained administration to him.

The bill stated that, in 1777, Barnardiston and Howes received the sum of 500*l.* secured by the mortgage, and laid it out on other securities; but this was contradicted by the answers, Howes saying, by his answer, that he alone received the 500*l.*, and that Barnardiston did not receive any part of it, although it was in evidence that he joined in the reconveyance, and in a receipt for the money, and that no part of it was relaid out on other securities.

Afterwards, in 1779, Barnardiston died, and, in 1784, Susanna Homer also died, by which [as the bill insisted] the plaintiff became entitled to the 500*l.*

Barnardiston made a will previous to his decease, and made some of the defendants executors, who renounced, and administration was granted to defendant Mary Howes, who was principally interested in the will. In 1780 a bill was filed, and, by a decree on the 6th of June in that year, an account was ordered to be taken of Barnardiston's personal estate, and his debts, &c. [*92] On the 12th February, 1781, the Master made his report; but the plaintiff never came in before him to prove any debt against the estate of Barnardiston, and Samuel Howes afterwards became insolvent, and assigned all his estate to trustees, for the purpose of a distribution among his creditors.

The cause came on to be heard at the Rolls, Wednesday, 19th May, when two questions were made:

1st. As to the legacy to the son and daughter of Susanna Homer by her first husband, whether, as they both died in the lifetime of the mother, the legacy vested in them.

The second question was, how far the estate of Barnardiston was liable for his having joined in the receipt and reconveyance of the mortgaged estate, to the mortgagor.

On this point, the cases of *Sadler v. Hobbs* (ante, vol. ii. p. 114), and *Westley v. Clarke* (1 Cox's P. Wms. 83 n.), were cited.

It was pressed, on the part of the defendants, that a further inquiry should be gone into as to the fact of Howes's receiving the whole money, and Barnardiston's not receiving any part of it.

But Mr. *Mitford*, insisting that this would be directing a further inquiry

(3) The additions between brackets are by the Editor, from Reg. Lib.

into a fact fully in the knowledge of the parties, and which they might have proved, and comparing it to the case of a bill of review, which is never permitted where the facts were in the knowledge of the parties, and could have been brought originally before the Court.

His Honor doubted whether he could direct such inquiry; and said, if the fact was so, though the trustees were obliged as jointenants to join in the reconveyance, they need not have joined in the receipt, but the reconveyance might have been in consideration of payment of the money to the one who really received it, and therefore he inclined to think, the receipt being in evidence, and no proof against it, the plaintiff must have a decree against the estate of Barnardiston, but, as it was a hard case, he would consider whether he could make the inquiry.

*On the 28th June, his Honor gave judgment to the following [*93] effect:—

The plaintiff claims a legacy of 500*l.* secured upon mortgage, as assignee, and also as administrator, of John Wright. In this last character of administrator, it is, that I think he is entitled. (4) It will, therefore, be liable to the debts of John Wright.

The first question is, whether John Wright was himself entitled; that is, whether, under the words of the will, the interest upon the death of the sister vested in him. It is contended, on one side, that as they both died in the lifetime of Susanna Homer, either the legacy should be equally divided between their representatives, or neither of them should claim. On the other side, several cases are cited to show that the legacy vested: *Hutchins v. Foy*, Comyns, 716; *Killet v. Dawson* (antea, vol. i. p. 119); *Benyon v. Maddison* (antea, vol. ii. p. 75). But it is settled now, that such a legacy is vested; I am, therefore, of opinion that, on the death of Lydia, it survived to her brother, and the plaintiff, as administrator, is entitled to this legacy. (a) The bill is brought by the plaintiff, as administrator to the brother, for this legacy. The testatrix died in 1766. In 1777, the mortgage was paid off, and an assignment made to the mortgagor by Barnardiston and Howes, and each acknowledged the receipt of the money. In 1779, Barnardiston died. In 1780, Mrs. Barnardiston filed her bill, and the usual decree was made for his creditors to come in. It is to be observed, that, when this decree was made, Mrs. Homer was alive. She did not die till 1784; so that the reversionary interest had not fallen, and therefore no laches can be attributed to the brother or the plaintiff. It is true, they might have had it secured by filing a bill, but parties are not bound to file a bill for security. In 1784, Mrs. Homer died, and in 1786, the bill was filed against Howes and the representatives of Barnardiston. It is objected, that, in point of fact, the money was paid only to Howes: on the other hand, it is said that fact does not sufficiently appear in the cause. The admission by Howes cannot be received, and there is no evidence before me to rebut the presumption arising from their joining in the receipt. It is desired that I will permit it to go to the Master to inquire as to the truth of that fact; but, though I would not encourage persons who do not make out their case, *by going to a further inquiry, I would, in a case which I think [*94] a hard one, by some means, make a further inquiry, if I thought it would be of any use. But I think it is unimportant; for it comes to this, that a legacy of a mortgage being given to trustees, for one for life,

(4) The decree declared, accordingly, that the plaintiff was entitled, but "without prejudice to any question respecting the validity of the assignment."—R. L.

(a) See *Killet v. Dawson*, 1 Bro. C. C. 119, and notes and cases cited.

and then over to another, the mortgage-money is paid to one executor, the other joining in the conveyance, signing the receipt, and afterwards neglecting to have it laid out according to the directions in the will; and the question is, whether this will not make the executor liable. It was contended that it was the rule, that executors joining in a receipt are both liable. To that I enter my dissent, for I do not hold that an executor cannot, in any case, be discharged from a receipt given for conformity. (b) I do not find fault with the case of *Westley v. Clarke*; but this case proceeds on a different ground. (5) The cases on the subject are all collected in that of *Sadler v. Hobbs*; and that case must govern, it being a weaker case than this. I have looked into the case of *Townley v. Sherborne*, in *Bridgman*, 35, (6) but I cannot agree with that case. (7) *Fellows v. Mitchel*, 1 Wms. 18, maintained the same doctrine, and, till *Westley v. Clarke*, there is no case where an executor joining in a receipt has not been held liable.

In *Murral v. Pitt*, 2 Vern. 570; 21 Viner, 534, the plaintiffs were residuary legatees, and brought their bill against executors who had joined in a transfer of stock, and divided the money between them; one had become insolvent, and it was held the other was liable for the whole, because it was a voluntary act. And, in that case, the executors were merely in the case of trustees, as the bank will not admit a transfer but by all the executors. I should be sorry, in such a case, to determine that a man should be bound by the act of his co-executor. There is a case in the same page of Viner (*Attorney-General v. Randall*), which recognizes the case of *Churchill v. Hobson*, and the distinction between trustees and executors, which is also recognized in *Aplyn v. Brewer*, Pre. Ch. 173, and in *Ex parte Belcheir and Parsons*, Amb. 218. The cases of *Churchill v. Hobson*, and *Westley v. Clarke*, seem to be the only ones that break in upon the rule: and that of *Westley v. Clarke*, only shows that a man who was joined in receipt is not in all cases liable. But the case of *Sadler v. Hobbs* must determine the present case; there two executors, unnecessarily, and without the excuse of thinking it *necessary, joined in ordering money to be paid into a house, by which means it was lost. Lord Chancellor seemed not to approve of the case of *Westley v. Clarke*, and also to think that *Churchill v. Hobson* was wrong. To the opinion given in that case I subscribe. It does not appear, in that case, what the trust was. Here, it was to lay the money out in the public funds: it was not money wanted to pay debts, and left in the hands of the trustee for that purpose. Perhaps, in a court of law, the signing the receipt would be conclusive evidence of receiving

(5) Lord Eldon C. observed, in *Chambers v. Minchin*, 28 May, 1802, that Mr. Brown had reported this case so very ill, that it was impossible merely from thence to know what were the real sentiments of the Master of the Rolls on the occasion. "Certain it was, however," his Lordship added, "that, as to several matters, his Honor did not express himself as stated in the report." The Lord C. referred particularly to the sentence above, and to the concluding paragraph of the judgment. From the Editor's MS. note taken in Court. *Chambers v. Minchin* is reported 7 Ves. 186, &c., but the above observations are unnoticed in that report.

As to *Westley v. Clarke*, &c., vide the Editor's note, antea, 2 vol. 114, before referred to.

(6) *Townly v. Chaloner*, Cro. Car. 312, S. C.

(7) Lord Redesdale's notes, inquire "why not?" which again shows how very inaccurate this report is.

(b) *M'Nair's Appeal*, 4 Rawle, 167; *Ochiltree v. Wright*, 1 Dev. & Bat. 341; *Sadler v. Hobbs*, 2 Bro. C. C. 117, note (c); *Hovey v. Blakeman*, 4 Ves. 608. The joining in a receipt is not absolutely conclusive. *Hovey v. Blakeman*, *Ochiltree v. Wright*, ubi supra. See the observations and rule laid down by Lord Redesdale, in *Joy v. Campbell*, 1 Sch. & Lef. 341.

the money: I think it is not so in a court of equity. But, in this case, Barnardiston was the first in making the conveyance and in the receipt; and intermeddled as an acting party; I, therefore, think his estate liable. (8) (c) (d)

(8) See the observations in note (4) *ante*. As Mr. Brown's report of the judgment is so erroneous, the Editor thinks it will be acceptable for the profession to have a comprehensive statement of it from Lord Colchester's MS. notes.

Master of the Rolls. — "The first question is, whether, on the death of the sister, the legacy then immediately vested in the brother.

"It was argued, that either it was divided equally between them, or belonged to neither of them, as both died before the time of payment. For this purpose were cited *Hutchins v. Foy*, Comyns, 716; *Dawson v. Killet*, 2 P. W. 612; and it is now admitted to be the rule, that the interest vests in subsequent legatees at the same time when the first interest vests. But I am bound by the words, and will not permit myself to conjecture; and as the words of the will are with the plaintiff, and as one of the children did die in the lifetime of the mother, the legacy vested in the surviving brother, and on Mrs. Holborn's death his assignee took it.

"The other part of the case is this. — The testatrix died in 1766; this mortgage was paid off in 1777, Jan. 14th; and then Barnardiston and Howes assigned and gave the usual receipt jointly. Howes only receiving the money. Barnardiston died in 1779. The bill was filed in 1780 by Mrs. B., who was entitled to a share of his personal estate; and on a decree to bring in Barnardiston's creditors there only remained the 400*l.*, which was ordered to be paid to Stone for those entitled under the will; viz. first, Mr. Howes, and afterwards to the other defendants. At the time of this decree, Mr. Holborn was then alive, so that the interest was not then in possession, and no laches, or at least culpable laches, can be imputed to the children for not filing a bill to secure this legacy, though they might have done it; and there is no rule to punish persons so entitled for not filing their bill. In 1784, Mrs. H. died, and then the interest accrued to the plaintiff. In 1786, the bill was filed against Howes, the surviving executor, and Barnardiston's assignee. It was insisted at the bar, that though here was a joint receipt, yet the sole payment was to Barnardiston. Strictly speaking, there is no proof to rebut the assertion that the money was paid to both, as these pleadings stand; and if, in my opinion, the want of this proof would have made a difference, I should have directed an inquiry. But even if it had been proved, yet I am of opinion the decree must be against the assets of Barnardiston. The case then is this, that this mortgage is paid off to one of the executors; the other joining in the receipt, and both neglecting to lay it out: and the question is, whether this neglect does not charge both for leaving the fund in the hands that have become insolvent; and on personal security against their trust? I dissent from the rule, as broadly stated, that if one executor receives the money, and two sign the receipt, both are chargeable, if it appear the second joined for conformity only. But I do not find fault with Lord Northington's rule, in *Westley v. Clarke*, 1 P. W. 83, Mr. Cox's notes. The cases on this subject are most of them in 2 Bro. 114; *Sadler v. Hobbs*, which must govern the present, being a much weaker case than this. His Honor then went through all the cases cited in *Sadler v. Hobbs*: he also said 534, Vin. Abr. MS. case is worth noting, though not cited in *Sadler v. Hobbs*: he also cited *Ambler*, 218, by Lord Hardwicke; and Lord Northington's decision in 1 P. W. 83, *Westley v. Clarke*, introducing the distinctions. The defendants rely upon *Churchill v. Hobson*, and 1 P. W. 241, *Salk*, 318, and *Ambler*, 218, and *Westley v. Clarke*, cited in Cox's note to *Fellows v. Mitchell*, 1 P. W. 83, and the distinction made by Lord Harcourt, where the claim against executors is by creditors, who come forward to the full extent of the rule; or by legatees who are not entitled to such favor. *Sadler v. Hobbs* decides this; and it is a material and essential circumstance that here the co-executor signing, though not receiving, suffers his co-executor beyond the mere purpose of holding assets to pay debts; for he suffers him to retain it for years, to pay interest of the fund when cleared of debts, and he ought to have laid it out. I must declare that the assets of Barnardiston must be applied to satisfy this legacy so far as they extend, and the rest to be paid by Howes."

The Editor adds another case from Lord Redesdale's notes.

"*Carsey v. Barcham*, March 16, 1753. Two trustees sold real estate for 630*l.* and both joined; 320*l.* left with purchasers to pay legacies; 300*l.* paid to Barcham (one trustee), to pay legacy to himself, and a debt and 10*l.* to Havers, the other trustee, for a legacy; plaintiff a creditor on note, not included in debts paid. Decree both defendants to pay." Per M. R. — Havers reheard the cause before the Lord Chancellor.

Lord Chancellor. — "A trustee is only liable for what he receives or applies; but here Havers has made himself liable by joining in the direction in the purchase deed, by which the 300*l.* was left in the hands of the purchaser to pay legacies. It was a devastavit and misapplication. Decree, Barcham to pay; on his default, Havers; and if Havers pays, he is to stand in plaintiff's place against Barcham." — From Lord R.'s notes.

(c) See *Sadler v. Hobbs*, 2 Bro. C. C. 114, notes and cases cited.

(d) In the late case of *Lord Montfort v. Lord Cadogan*, 17 Ves. 489, (afterwards affirmed on appeal, 2 Meriv. 3), this case was cited by Sir Wm. Grant, as proving, that though the breach of that was merely a personal default of the trustee, productive of no benefit to his estate, yet his assets were liable to make compensation, as also the observations of Lord

Redesdale, in *Adair v. Shaw*, 1 Sch. & Lef. 272, that it had been the constant habit of a court of equity to charge persons in the character of trustees, with the consequence of a breach of trust; and to charge their representatives also, whether they derive benefit from the breach of trust or not. — *Eden*.

WITTS v. BODDINGTON.

(Reg. Lib. 1789. B. fol. 657. b.)

Jewels, &c., given to the wife for life, and then to such grandchildren as she shall appoint. If she makes no appointment, they shall go equally: (1)

LEE STEERE, (2) by his will, gave (*int. al.*) to his wife jewels, plate, &c. for life, and after her decease to such of his grandchildren in such proportions as she should appoint; but, if there should be no grandchildren alive, then to some of his own relations, but made no provision in default of appointment.

The wife by her will made no appointment, but ordered the plate, &c. to go as her husband had directed by his will. (2)

And Lord CHANCELLOR was of opinion, and decreed, that they should go among all the grandchildren equally. (a)

(1) Vide *Mason v. Limbrey*, cited *Ambler*, 4.

(2) The whole of the statement in the text of this report is so very inaccurate, as to be incapable of explanation by notes. The profession will therefore consider it as expunged, and accept the following substitution from Reg. Lib., which the Editor thinks will be more acceptable than a mere reference to an extract of part of it (from the same source), in *Brown v. Higgs*, 5 Ves. 503.

Lee Steere, the grandfather of the plaintiffs, by his will (*inter alia*), "gave to his wife the use and enjoyment during her life of all his watches, rings, jewels, and plate, and all her diamonds, &c. with power for her, by will or by deed, to give and bequeath the same unto or among some one or more of the child or children of his daughter, Martha Witts, in such manner and proportions as she his said wife should think proper; but in case no such children of his said daughter should be alive at the time of his wife's decease, then he desired her to give or leave the same unto some one or more of his own relations, as she should think proper, so that the same should not at any time, or in any manner, go, or belong, to any of the family of Witts."

Martha was the wife of — Witts, and was the testator's only child. The plaintiffs were her children.

The widow of the testator alone proved his will. By her will she said that "she should not bequeath the family plate and jewels to any grandchild; but, as a mark of esteem for her husband's memory, would leave them to be disposed of as he had mentioned in his will, if she did not leave them to either of the children." She did dispose of some of the watches, &c., and some of her own diamonds, to some of the grandchildren.

The decree declared, "that the testator's watches, rings, jewels, plate, and also his wife's diamonds, pearls, rings, jewels, watches, trinkets, and ornaments mentioned in his will were to be considered under the will of Elizabeth Steere, his widow, as passing to all the said testator's grandchildren in general;" and directed the same to be preserved for their benefit accordingly. (a) — (R. L. fol. 664).

(a) See *Sugden on Powers* (4th Eng. ed.), 395 - 401, ch. 6, § 3; *Jarman's note* to 1 *Powell on Devises*, 294; *Cole v. Wade*, 16 Ves. 27; *Birch v. Wade*, 3 V. & Beames, 198; *Stubbs v. Sargon*, 2 Keen, 255; 2 *Story, Eq. Jur.* ch. 29, § 1061.

READ v. DEVAYNES.

[Vide S. C. in a subsequent stage, 2 Cox, 285.] Rolls, 25th June.

(Reg. Lib. 1789. B. fol. 606. b.)

Executor not entitled to his legacy without proving the will, (1) [although the will expressed it as a work of gratitude for past favors.] (1)

THE testator gave legacies to certain persons by the description of "his very good friends;" and, in the further part of the will, desired them "to act as executors." (2) Smith, one of the persons, by his answer, said that he had not proved the will, or acted as executor, but claimed his legacy. His Honor said an executor, so appointed, could not claim his legacy without acting, or, at least, proving the will. (a)

(1) For the doctrine on this subject, see *Abbot v. Massie*, 3 Ves. 148, 149; *Harrison v. Rowley*, 4 Ves. 212, 216; *Stackpole v. Howel*, 13 Ves. 417, 420, and the principal case on farther directions; 2 Cox, 285. { *Andrew v. Trinity Hall*, 9 Ves. 534. }

(2) The M. R., no doubt, said what Mr. Brown has reported; but in fact his Honor did not decide against the claim on this occasion; the point being expressly reserved. — R. L. The executor after this proved the will; and upon the cause coming on for further directions, he was in consequence held entitled. See the report, 2 Cox, 285. The Editor suggests whether Mr. Smith ought not to have had his legacy, at all events, under the particular words of the will. After appointing W. E. and W. Smith as joint executors in England, the testator "requested them to accept of 100*l.* each, as a small mark of his gratitude for the friendship they had always favored him with." — R. L.

It appears, however, from Sir J. Simeon's MS. note, that Sir P. Alden, M. R., said the party would not take it without acting as executor, "notwithstanding the legacy was given as an acknowledgment of past favors; and his Honor thought it would be so, even between a father and child, on a legacy given to the child." Sir J. Simeon's notes; et vide in S. C. 2 Cox, 285.

Another point occurred in this cause. It appears, from Reg. Lib., that the testator bequeathed the residue of his personal estate to be divided amongst his three children, the plaintiffs, Ann, Catherine, and Thomas, by Sarah Abraham, in such way as his executors should think proper; and in case of the death of any of them the testator directed his or her share to be equally divided between the survivors. Thomas died in the year 1780 after the testator. These bequests were held indisputably to have vested in the two surviving children, notwithstanding the refusal of Smith to exercise such a discretion.

(a) See 2 Williams, Ex. Pt. 3, Bk. 3, ch. 2, § 6, p. 796, &c.

If a legacy be given to an executor in that character, he cannot take it, unless he qualifies and makes himself executor. *Rothmaler v. Myers*, 4 Desaus. 215.

It is otherwise when a legacy is given to an executor in another character, as, if given to him as nephew of the testator. *Granberry v. Granberry*, 1 Wash. 246.

See *Cockerell v. Barber*, 2 Russ. 595; S. C. 1 Sim. 23.

*WILLIAMSON v. CURTIS. Rolls, 25th June. [*96]

Where the 1st trust is for payment of debts, the purchaser is not bound to look to the application of purchase-money. (1)

BILL, *inter al.* for a specific performance against the purchaser of marsh lands, who objected that he should be obliged to look to the application of the purchase-money.

His Honor said, that, where (as in this case) the first trust is for the payment of debts, the trustee may sell, and the purchaser is discharged from looking to the application of the purchase-money. (a)

(1) Vide *Smith v. Guyon*, ante, 1 vol. 186, with the Editor's note, &c.; *Sugden, V. & P.* 436, &c.; and see also the Editor's note to *Prideaux v. Prideaux*, ante, 1 vol. 287.

(a) See cases cited to *Smith v. Guyon*, 1 Bro. C. C. 186, in notes; 2 Story, Eq. Jur. ch. 31, § 1127, 1130, 1131, 1132; *Andrews v. Sparhawk*, 13 Pick. 393; *Gardner v. Gardner*, 3 Mason, 178; 3 *Sugden, Vend. & Purch.* (6th Am. ed.) ch. 17 § 1 art. 9 p. 99 154.]

COOPER v. THORNTON. (1) Rolls, 3d March, 28th June.

(Reg. Lib. 1789. A. fol. 638. b.)

Legacy given to A. to be divided between himself and his family, is well paid to A. (1)
 [Acquiescence of a legatee to a payment made to the father, &c., how far binding after length of time and death of parties.]

BONNELL THORNTON, by will, gave several pecuniary legacies, and among the rest, "to Thomas Cooper, of _____ street, Westminster, one hundred pounds, to be equally divided between himself and his family," and made _____ Winstanley, and the defendant (his wife) executors, and the defendant, residuary legatee, and died May 9, 1768.

In November, 1769, Winstanley paid the legacy to Thomas Cooper, who, at that time, had a wife and seven children, six of whom were adults, and the seventh an infant. The father lived till 1775; when he died, no demand having been made by any of his children, of this legacy. Henrietta, the youngest child, became of age in 1777. In 1784, she, and the other children made a demand of this legacy; and in 1779, they filed this bill (after the death of Winstanley) against the defendant, as executrix and residuary legatee of the testator, for this legacy, insisting that the payment to Thomas Cooper was not a good payment; and, therefore, that the defendant was liable to pay it over again.

The cause was heard at the Rolls on the 3d of March last, and several cases were cited on each side, but as they, and the arguments made use of on both sides, are comprised in his Honor's judgment, it is unnecessary to repeat them.

On the 28th of June his Honor gave judgment.

[*97] *After stating the case, and the demand made by the bill, he proceeded to the following effect:—

To this demand, it is contended in answer, upon the common rule of presumption with respect to bonds, that it must be presumed, from the length of time, that the legacy has been paid; (a) but I shall take no notice of this presumption, because it being in proof that it was paid to the father, the case does not admit a presumption that it has been again satisfied. All the cases where that presumption has been admitted, have contained circumstances from which the presumption might arise; which not being the case here, there can be no such presumption. The only question then, is, whether the payment to the father is a sufficient bar to the demand made by the plaintiffs. It is argued, on the part of the plaintiffs, that the payment to the father, of legacies given to his children who are not of age, is a bad payment. In early times, it appears from the case of *Holloway v. Collins*, in the 26th and 27th Car. 2, 1 Eq. Abr. 300, that the payment to the father, of a legacy to the child, was held good; but since the case of *Dagley v. Tolferry*, 1 Wms. 285, 1 Eq. Abr. 300, the idea of the Court has been that it is not a good payment; and that even in the case of an adult child, it is not good, unless done by the consent of

(1) Affirmed on appeal by Lord Thurlow, C., postea, 186. So also *Robinson v. Tickell*, 8 Ves. 142. Et vide *Forbes v. Ball*, 3 Meriv. 437. Upon the point of wrong payment, where there is an interest in the party, see the cases within cited, and *Lee v. Brown*, 4 Ves. 362, 367.

(a) See *Andrews v. Sparhawk*, 13 Pick. 393. As to the effect of the statute of limitations upon legacies, not charged on land, see *Souzer v. De Meyer*, 2 Paige, 574; *Kane v. Bloodgood*, 7 John. Ch. 90, in which it was held that the statute might be interposed. But see contrary, *Irby v. M'Crae*, 4 Desaus. 422; *Arden v. Arden*, 1 John. Ch. 313; *Wilson v. Kilcannore*, 4 Hayw. 185.

the child, or made so by a subsequent ratification. (b) In that case, the rule was laid down, and was laid down very harshly; as the testator, on his death-bed, had given directions that the legacy should be paid to the father, and there had been mutual accounts between the father and the child, and an acquiescence for near fifteen years. It appears, from the Register's book, that evidence was read that the legacy was ordered, by the testator, to be paid to the father, but that circumstance can make no difference, as I doubt much whether such evidence ought to be read. It would be a dangerous thing to admit evidence, that a legacy given to one person was ordered to be paid to another. From the Register's book, of the year 1714, folio 414, it appears that the defendant was decreed to pay the plaintiff his legacy, with coets, but no interest; and, from the book A. of the year 1715, folio 40, that an appeal being brought before Lord Cowper, the decree was affirmed; but, as it was thought a hard case, the deposit was divided. I lay the matter out of the case (2) that it was *directed to be paid to the father; and although it was so directed, [*98] and the money paid, and although the sum acquiesced a great length of time, it should be still competent to him, or his representatives, to demand it; because, a contrary determination would encourage such payments, and because the son must acquiesce, or pursue his father: or, which is the same thing, by bringing his suit against the executor, occasion his pursuing the father; and that I take to be the ground on which Sir John Trevor and Lord Cowper went: and if the legatee did not stand in that relation

(2) The Editor thinks it may be acceptable to insert a portion of Lord Colchester's note, from this part of the judgment to its conclusion:—

"The rule, therefore, appears to be, that where a legacy of a considerable sum is paid by executors to the father, and the legatee, knowing it, permits the father to retain it, still he or his assignees may demand it. He is only punished for delay by loss of intermediate interest; and the principle is laid down by Lord Hardwicke, in 2 Atk. 80; *Phillips v. Paget*, that this rule is in order to prevent wrong payments of executors. And mere acquiescence by the son after he become adult, is no bar; because it would then force the son perhaps to send his father to gaol for the wrong act of the executor. *Phillips v. Paget*, which is the only other case besides *Dagley v. Tolferry*; but unfortunately it went off on compromise, and so no minute of it appears in the Registrar's book. We must rely on 2 Atk. 80, though not so accurate a report as could be wished. And from *Phillips v. Paget*, I cannot clearly deduce that Lord Hardwicke thought *Dagley v. Tolferry* wrong; but yet he seems to have thought that the executor paying wrongfully, but by mistake, ought not to be called upon twice. The executor, in *Phillips v. Paget*, thinks himself bound to pay to prevent a forfeiture. If well advised, I admit that the executor would have been told there could be no good payment to an infant himself, unless the will had expressly directed it to be to the infant, notwithstanding infancy.

"1st. In this case I do not at all differ from *Dagley v. Tolferry*, but I conceive that the will itself warrants this personal payment to Thomas Cooper himself, so as to take it out of the rule of *Dagley v. Tolferry*. Here is no word, 'to be by him divided,' I agree; but the word 'himself,' shows that he was meant to be the dividing person, and I lay great stress on the word 'himself.' Besides this, the division is between himself, and (and not his children but) 'his family,' which goes beyond children then born.

"2d. Even supposing this case doubtful, if Lord Hardwicke laid stress on the circumstance of the executor being mistaken in *Phillips v. Paget*, *multa magis*, is this executor excused by making a mistake in this case on such words as these.

"3d. As to acquiescence, I have already said that acquiescence of a child, after he becomes of age, does not bar him. But even after the wrong payment of *Winstanley*, the executor (if the first construction on the word 'himself,' is insufficient), yet as the infant acquiesces after the death of the father, and the bill is then filed, not against the executor who made the wrong payment, but against the co-executor and residuary legatee, who did not make the mistaken payment, I am of opinion the bill cannot be sustained.

"In the first place, upon the whole, I am clearly of opinion, this payment was well made to Thomas Cooper on the words of this legacy.

"2dly. I think the mistake on these words might be a defence.

"3dly. This acquiescence, after the death of the father, and after the death of the executor, who made the payment, bars the claim, and prevents a bill against the surviving and innocent executor, and I will not make a forced construction to avoid *bona fide* payments."

"Bill dismissed with costs."

to the person to whom the legacy was paid, the bill would be dismissed. The only other case is *Phillips v. Paget*, 2 Atk. 80. It went off upon a compromise; so that we have no account of it but from Mr. Atkyns's book. There the executor was misled by the testator's directions, to pay the legacies within a given time; which circumstance ought to have weight in the judgment. Then let us consider the circumstances of the present case, for I do not mean to interfere with the doctrine of *Dagley v. Tolferry*, that a payment to the father is bad. The present is a stronger case for the executors than that of *Phillips v. Paget*. Here, after several other legacies, all with the words, I give to, &c., is the following, "to Thomas Cooper, to be divided between himself and his family." It is contended that, notwithstanding the case of *Dagley v. Tolferry*, here Thomas Cooper's was to be the hand to receive. I should do the harshest thing imaginable, to make the executor pay it over again. It is true, the testator has not inserted the words *by him to be divided*. If he had, there could not have been a doubt: but if he meant the executors to divide, why did he mention Thomas Cooper? What did he mean by the word *himself*? That can only be applicable if Thomas Cooper is to divide. Then it is not to him and his *children*, but to his *family*, which is much more extensive. It is to be paid to him, and he, as a trustee, is to divide it. If any of the children had called upon him to have it secured, it must have been so. Therefore, if in *Phillips v. Paget*, the executor was discharged, *a multo magis*, he must be so here. Then it was paid by Winstanley in a manner that was wrong; for I must allow it to be wrong, if it was not meant to be paid to Thomas Cooper. Cooper died in 1775; from that time, the plaintiffs might have called upon the executor, without his being able to pursue the father. In 1777, the youngest came of age; [*99] why did they not then file their bill against Winstanley, who did not die till after this bill was filed? For six years they took no step. If they had brought their bill, they might have recovered against Winstanley. But, under the circumstances of the case, I believe it was well paid, and that it was intended that he should receive it. (c) If one was to give a legacy to the senior Six Clerk, to be divided among himself and the other Six Clerks, I think it should be paid to the senior, and the executor not be put to inquire who the other Six Clerks were. And that if it had been the case of a bequest of goods to A., to be divided between himself and family, A., with the assent of the executor, might bring trover for the goods.

Bill dismissed. (3)

[Affirmed on appeal by Lord Thurlow C. postea, 186.]

(3) With costs.

(c) 2 Williams, Ex. Pt. 3, Bk. 3, ch. 4, § 5, p. 865-869.

It is a general rule, however, that, where a legatee is an infant, and would be entitled to receive the legacy, if he were of age, the executor is not justified in paying it either to the infant, or to the father, or to any other relation of the infant, on his account, without the sanction of a court of equity. *Dagley v. Tolferry*, 1 P. Wms. 235; 2 Williams, Ex. Pt. 3, Bk. 3, ch. 4, § 5, p. 866; *Genet v. Tallmadge*, 1 John. Ch. 3; *Morrell v. Dickey*, 1 John. Ch. 153; 2 Macpherson on Infants (Eng. edit. 1841), 272.

RASHLEIGH v. MASTER.

[S. C. 1 Ves. jun. 201.] Lincoln's-Inn-Hall, 2d July.

(Reg. Lib. 1789. B. fol. 408.)

Money to be laid out in land, will pass by the words lands, tenements, and hereditaments, whatsoever and wheresoever. (1) Dividends of money in the funds not apportioned. (2)

By articles previous to the marriage of the Earl of Coventry with Ann Master, daughter of Sir Streynsham Master, bearing date 23d January, 1715, it was agreed that 5000*l.*, part of the fortune of the intended wife, should be laid out in land, to be settled upon the Earl for life, remainder to the intended wife for life, remainder to the younger children of the marriage, remainder to the Earl in fee. The marriage took effect, but there was no issue; and the Earl died 27th October, 1719, having made his will, but not having made any disposition of the 5000*l.*, or of his remainder in fee of the estate to be purchased therewith, leaving his widow surviving.

The 5000*l.* was not laid out, but continued on mortgage of the Coventry estate, till the year 1731, after which it was laid out, on mortgage, on the estate of Rowland Berkley, Esq.

Sir Coventry Carew, who was entitled, as heir-at-law to his mother, Lady Ann Coventry, daughter of the said Earl by his former wife, to the said 5000*l.* or the lands to be purchased therewith, subject to the life estate of the Lady Coventry therein, made his will, dated 20th February, 1747, and thereby gave certain estates called Rosarrow, &c. and all other his messuages, lands, tenements, and hereditaments whatsoever and wheresoever situate, and not therein by him given or devised, together with all Courts, &c., to hold *said estate called Rosar- [*100] row, &c. which were in jointure to his wife, immediately after her decease, to Jonathan Rashleigh, the father of the plaintiff, in fee; and all his other estates immediately after his decease, to the said Jonathan Rashleigh in fee, charging his said estates with the payment of 250*l.* yearly, which he was obliged to pay to Ann, Countess dowager of Coventry. And he gave all his lands, which he had in mortgage, to his wife, Lady Mary Carew, John Poole, and John Sandford, whom he appointed executors of his will, and died, leaving the late Sir Warwick Bamfield his heir-at-law. The 5000*l.* was paid off to Ann, late Countess of Coventry, and in the year 1754, was, by her, laid out, together with 18*l.* of her own money, in the purchase of 4800*l.* 3 per cent. bank annuities, in her own name, which were afterwards transferred into her name, and that of Randle Wilbraham, Esq., deceased, in which they now stand. The prayer of the bill was, that these annuities (except so much as was purchased by the proper money of Lady Coventry) might be transferred and divided, and the dividends thereof, from her death, paid to the plaintiff.

The question was, whether the 5000*l.*, to be laid out in land, passed by the residuary clause, as land, or passed to the legatees of the personality.

Mr. *Mitford*, for the plaintiff, contended, that it passed, as land, by the

(1) "S. P. Kendrick v. Kendrick, 31st July, 1800, without argument." From Lord Redesdale's notes. See also Hickman v. Bacon, postea, 4 vol. 333, and Pulteney v. E. Darlington, antea, 1 vol. 222, &c., with the Editor's notes.

(2) Where, however, an annuity charged on real estate, in aid of the personal, was in the terms of it to be paid quarterly, and an order had been made that it should be paid half-yearly out of funds in Court, an apportionment was directed on the event of the party having died between Lady-day and Michaelmas; Webb v. Lord Shaftesbury, 11 Ves. 361.

residuary clause, which by the terms lands, tenements, or hereditaments whatsoever and wheresoever was sufficiently extensive to pass this interest. That being ordered to be laid out in land, it was land, in this Court. In *Guidot v. Guidot*, 3 Atk. 254, money to be laid out in land was considered as land; for, in this Court, what is to be done, is considered as done. Lord Hardwicke there cited *Lingen v. Sowray*, (1 Wms. 172), (3) as a case in point.

Mr. *Mansfield*, and Mr. *Stanley*, contended, for the heir, that although this was to be considered as land, not being disposed of expressly, it could not pass by the clause. That there was no case where such an interest had passed by the words lands, tenements, and hereditaments; for, although it was an hereditament, it was not of such a nature as generally passes by that word.

[*101] *Lord CHANCELLOR said, he thought there was no difficulty,—but that this must be considered as land. That the heir argues it so; but still contends it is not devised: but this position is too far from being probable to afford any argument. The testator sets off with an intention to dispose of all his estates. If he had had estates in different places from those described, it might have afforded an argument that it was descriptive of locality; but here he has added the words lands, tenements, and *hereditaments* whatsoever and wheresoever. Then the heir argues, that this is a *hereditament*: but, if so, it comes within the description; and it is so, for being to be laid out in land, this Court would enforce the execution of the use. (4) (a)

A question arose, as to apportioning the dividends of the money in the funds. To this the Lord Chancellor said, the Court would not apportion dividends; (b) parties consenting to lay out money in stock, must abide the consequences. (c)

(3) "And Prec. Ch. 400, by which it appears the real estate was devised to the plaintiffs, one of whom was heir." — Lord R.'s notes.

(4) "In *Brent v. Tyndall*, 28th June, 1782, before Lord Thurlow, where a testator had devised his real estate in strict settlement, with power of jointuring all or any part, and had directed his personal estate to be applied in the purchase of lands to be settled to the same uses, and a tenant for life had, in pursuance of the power limited to his wife, by specific descriptions, all the devised estates, and had added, 'and also all other the messuages, hereditaments, and premises of him the said H. B. C. Brent, whereof or wherein he was then any ways interested in or entitled to, by virtue of the said recited will, of the said H. Brent, deceased (the testator), or otherwise howsoever.' The Lord Chancellor was of opinion this did not extend to the interest which the appointee had, in the personal estate of the testator, directed to be applied in the purchase of lands: and such personal estate was ordered to be paid to the heir of the remainder-man in fee under the will." From the notes of Lord Redesdale.

(a) 2 Story, Eq. Jur. ch. 13, § 790; Fonbl. Eq. Bk. 1, ch. 6, § 9, note (t); Pulteney v. Darlington, 1 Bro. C. C. 222, and notes; Ackroyd v. Smithson, ib. 503, &c., and notes; Ram on Assets, ch. 14, § 2, p. 211, &c.

(b) 1 Williams, Ex. Pt. 2, Bk. 3, ch. 1, § 2, p. 527, 513, 544; 1 Story, Eq. Jur. ch. 8, § 430; Fonbl. Eq. Bk. 1, ch. 5, § 9, and notes. See Webb v. Shaftesbury, 11 Ves. 361; Vernon v. Vernon, 2 Bro. C. C. 659.

(c) Costs were asked for the trustees and executors on the ground of their having been brought into Court; this was resisted, because, by their answer, they had claimed this as personality; his Lordship, however, said, that as it was merely a submission of the point to the opinion of the Court, they ought to have their costs. No costs were given either for or against the heir-at-law, (Ves.) As to the practice with respect to costs in the case of an heir-at-law, vide Seal v. Brownton, post, 214. — *Eden*.

VAUGHAN v. BURSLEM. Lincoln's-Inn-Hall, 2d & 3d July.

(No Entry.)

Chattels directed to go as heir-looms with an estate, "as far as the rules of law and equity will permit," vest in the first tenant in tail who comes into *esse*. (1)

THOMAS VERNON, of Hanbury-Hall, com., Worcester, Esq., being seised of divers manors, &c. in the county of Worcester, and possessed of a considerable personal estate, consisting, among other things, of ornamental and other plate, pictures, and household goods, in his house at Hanbury-Hall, by will dated 23d September, 1771, gave his manors, &c. to trustees, to uses under which his wife Emma Vernon was to receive 1600*l.* a year during her life, and to pay other annuities, remainder to the use of the first son of the testator's body, to be begotten, in tail; remainder to the second and other sons of his body (which uses never took effect); remainder to the use of his daughter Emma Vernon for life, *sans waste*; remainder to the use of trustees, to preserve contingent remainders; remainder to the first son of the body of his said daughter in tail; remainder to the second and other sons of his daughter in tail; remainder to daughters in the same manner; remainder to his wife for life; remainder to the plaintiff, by the description of Elizabeth Jane Letitia Maude for life, with remainders over, under which the other *plaintiffs [*102] would take estates, subject to the life of Emma Vernon the younger, the estates tail to her children, and the life-estates of Emma Vernon the elder, and Elizabeth Maude, now the plaintiff, Elizabeth Jane Letitia Vaughan. He then gave the use of his pictures to his wife for life, and directed that she should have the use of his plate until a son of his body begotten should attain twenty-one, or until his daughter Emma should attain twenty-one, or be married, which should first happen; and then desired such son, or his daughter Emma, should have the use of the plate; and directed further, that all his plate, household goods, furniture, glasses, and china, which should be in his house at Hanbury-Hall, should go as heir-looms with his real estate, and be held and enjoyed by the person or persons that shall, for the time being, by virtue of his will, be entitled to his said real estate, as far as the rules of law and equity will permit, and directed an inventory of the plate to go with the estate.

The testator died soon after making the will, leaving Emma his widow, and Emma the younger, his only child, him surviving; Emma the widow took possession of the pictures and plate, and kept them till the marriage of Emma the younger with Henry Cecil, Esq., in the year 1775, when Henry Cecil and Emma, then his wife, took possession of the same, together with the house at Hanbury-Hall; and, upon the death of Emma the elder, they also took possession of the pictures, and some plate which were given to Emma the elder for life; and afterwards Henry Cecil disposed of the plate, by sale or exchange, for more modern or fashionable plate.

Henry Cecil had, by his wife Emma, a son born (who lived six weeks), and who was tenant in tail in remainder under the will of Thomas Vernon,

(1) Vide *Foley v. Burnell*, ante, 1 vol. 274, &c., with the Editor's notes, and 4 Bro. P. C. 119, octavo ed. Upon the principal case, &c., vide in *Lady Lincoln v. D. Newcastle*, 12 Ves. 225, 235; *Carr v. Lord Errol*, 14 Ves. 478, 487. See also 1 Ball & Beatt. 25, 26, and 1 Meriv. 281. From all the authorities it appears settled, that such words as the above, "as far as the rules of law and equity will permit," make no kind of difference.

his maternal grandfather; and, upon his death, Henry Cecil obtained administration to him.

Henry Cecil, afterwards going abroad, gave a power of attorney to the defendant Burslem, whereby he authorized him to act as his attorney, and by virtue whereof Burslem removed the plate from Hanbury-Hall.

The plaintiffs, as persons entitled in remainder to the estate, and, as they contended, also to the plate, &c. directed to go with them as [*103] heir-looms, filed their bill against Burslem, the attorney *of Henry

Cecil, who was out of the jurisdiction of the Court, and against Emma Cecil, who lived separate from her husband, praying that an inventory might be taken of the plate, and an account of that which had been sold or exchanged, and the effects returned to Hanbury-Hall, and secured there for the benefit of the persons interested in the estate, and that Burslem might be restrained by injunction from selling the same.

The defendant Burslem, by his answer, admitted the facts, but insisted that, by virtue of the letters of administration to his son, and in right of Emma his wife, Henry Cecil had the absolute interest in the effects devised as heir-looms, and that he, the defendant, as his attorney, was entitled to dispose of the same.

Mr. *Steele*, for the plaintiffs. The only question is, whether this case is exactly within the rule of *Foley v. Burnell* (ante, vol. i. p. 274); or the words "as far as the rules of law and equity will permit," take it out of that rule.

In *Gower v. Grosvenor*, Barnard, 54, Lord Hardwicke was of opinion, that when the testator uses the words "as far as the rules of law and equity will permit," a court of equity will carry the limitation as far as the court could execute it. And it might certainly have been so limited here, as to prevent the son from taking it till he attained 21, and entitled to the possession of the estate; and the limitation might have been, that, in case he died under 21, the plate should go over with the estate: that limitation would have been good, as being within 21 years after a life in being; and as the son might have been prevented from taking till 21, the court will say it is left to it to make the limitation. In *Gower v. Grosvenor*, Lord Hardwicke drew the consequence from the words, which were the same as in this case, and held there was no aim at a perpetuity. In *Trafford v. Trafford*, 3 Atk. 347, furniture was given as heir-looms, and the court held itself bound to effectuate the intention of the testator. In *Foley v. Burnell*, there were no such words, and for that reason it was, that the court thought the property vested.

Mr. *Mansfield*, for the other parties in the same interest. The only question is, whether the rules of law and equity will permit the [*104] limitation, and whether the chattels can be carried *with the real estate longer than the birth of a person who would be tenant in tail of the real estate.

The struggle in *Foley v. Burnell* was to find words equivalent to the present, for it was taken for granted if the will had contained such words, the court would have given them effect.

Mr. *Mitford*, (2) and Mr. *Cox*, for the defendant Burslem. (2) We

(2) Lord Redesdale's MS. notes observe, that "the argument on the part of the defendant Burslem was, that the rights were declared by the will; that the question therefore was, not how the property might be settled so as to exclude the defendant's claim, but whether it was so settled by the will; that no person can transmit an interest in chattels to his descendants by force of a gift to himself as purchaser; that therefore, if chattels are given to a man, and are intended by the giver to be taken by him for the benefit of himself and his descendants, the intent cannot be accomplished, except by an absolute gift to him, leaving the future title

contend that Mr. Cecil, as husband of Emma the daughter, and as administrator of his son, is entitled to the absolute property. The question is, whether the plaintiffs, after the birth of the son, can have any interest. *Foley v. Burnell* differs in some respects from the present case. The gift was to the person who should be entitled to the possession of the real estate. It was argued that, not being in possession, he was not entitled to the goods, but it was held that he took an absolute interest. *Trafford v. Trafford* is not applicable to the present case. Nothing was to be taken, in that case, by any person till 21; that was a condition on which he was to take, and being tenant in tail alone would not do. In *Gower v. Grosvenor*, it is said the words gave the court a power to model the limitation. But no such thing was determined. All that was determined was that the person only took a life-interest, and that, as there were words of reference, it was the same as if the words had been repeated, and, in the event of not having issue, the chattels went over. It was merely that Sir Thomas did not take absolutely. Here the disposition is that the goods shall go as heir-looms. Some interest was meant to pass to Mr. Cecil's son. Then the only question is, whether your Lordship can modify the limitation with all the strictness a conveyancer could invent. The children of the marriage were meant to be entitled to the estate. Suppose the child had married under 21, and died, having a child, what could your Lordship do? The words, *as far as law and equity will permit*, are only that the goods shall be enjoyed by the persons who in law or equity are entitled to the estate, and are satisfied by letting a person who is entitled to the real estate as tenant in tail, have the chattels absolutely; and he must, by the rules of the Court, have the chattels absolutely, if he is entitled to the realty as tenant in tail. If the restriction contended for were to prevail, the consequence might be, that the tenant for life and the tenant in tail in remainder might suffer a recovery of the real estate, *and dispose of that, but could not dispose of the chattels [*105] meant to accompany it; for the real estate would be alienable by the tenant in tail joining after 21, though not in possession, and yet he could not convey the personal chattels. It may be true, that, had the testator been asked if an infant should become so entitled, whether it was his will he should take the chattels absolutely, he would have answered no; but that cannot be admitted: if the testator gives a legal title, it must have its legal consequences. This is the rule which has been adopted in matters analogous to the present.

Mr. *Solicitor-General*, in reply. The only question is, whether there

of his descendants to his discretion. A gift of this description may be qualified by condition, as that the donee shall not take till entitled to possession of a freehold estate, or till he shall attain twenty-one, as in *Trafford v. Trafford*; and then if the donee does not become entitled to possession of the freehold, or does not attain twenty-one, he cannot take the chattels, because it is not given to him till that event. So it may be given subject to a subsequent condition to defeat his title, as if chattels are given to A., but if he shall die under twenty-one without issue, then over. It could not be limited over upon a mere remote event respecting a person unborn. If there is in this case no precedent or subsequent condition, then the case falls within the rule of *Pelham v. Gregory*, 5 Br. P. C. 435, in which it was determined, that where chattels are directed to go in the same manner as freehold land, an absolute interest vests in the first tenant in tail of the land. This case is the same, except as the words as far as 'by law,' &c. may vary it. The gift is in terms immediate, to be held and enjoyed by the person entitled to the real estate, not by the person in possession, or when twenty-one, but by persons entitled without any qualification, unless the words 'as far as law will permit,' &c., create a qualification amounting to a precedent or subsequent condition. But these words declare nothing in certainty. They are capable of being satisfied by reference to the limitations of the real estate, and the difference in the nature of real and personal estates. They can create of themselves no condition, previous or subsequent." On this, see 12 Ves. 285, 286.

may not be superadded, to an estate tail, a limitation that is not too remote in point of time, that, if the party to whom the estate tail is given should die under twenty-one, the estate shall go over, and whether this limitation would not be good. Such a limitation of the personal estate expressly made, would certainly have been good. Then the question is, whether the testator can be supposed to have meant more in this case than if he had said "to be heir-looms forever." It was not attempted to be argued in *Foley v. Burnell*, that if the words had been the same with those in *Gower v. Grosvenor*, they must not have had the same effect as they had in that case. This being a gift to the person taking the real estate, the testator meant that person should take the same interest in the chattels as in the real estate, qualified, as to alienation, as far as he could have limited it, and subject to its going with the realty as long as by law it might, which would be that a child, not attaining twenty-one, could not dispose of it. In *Gower v. Grosvenor*, Lord Hardwicke thought it should go to a master to form a settlement. In *Trafford v. Trafford*, he conceived he executed the idea he threw out in *Gower v. Grosvenor*: he thought it should go to the first tenant in tail who should attain twenty-one. In the *Duke of Bridgewater v. Littleton* (antea, vol. i. p. 280, note; less correctly stated 2 Vesey, 121), there is nothing with respect to the chattels going as long as law or equity will permit. In the present case there is no direct gift to the devisee of the real estate, only a direction how the chattels shall go.

LORD CHANCELLOR. I am called upon to say that the effect of [*106] the will is to prevent the use from springing, where, if it sprang,*it would give an absolute estate. To do this, I must determine that the use shall not spring or vest till twenty-two years after the death of Emma, the first taker for life. How am I to gather this? from the words "as far as the rules of law and equity will permit?" (3) This cannot be; the uses could not go further than the law will permit. But these words have their sense; for he seems to have known that the personal property could not go so far as the real. (a) The case of *Gower v. Grosvenor* has the same words: and it seems as if the reporter took the language of Lord Hardwicke; but there is a considerable chasm, (4) and with what modifications that was filled up I cannot say: but I think it is not necessary to follow all that is there said. Here, the estates are given to Emma for life, remainder to the first and other sons, with remainder over, and the furniture, &c. is to go to the person entitled to the estate as far as the law will permit. The person entitled seems an express description of the child of Cecil. The other cases have had different words. In *Foley v. Burnell*, it was contended the word *possession* was in opposition to *reversion*; the use, there, did not spring, for want of the contingency arising on which it was to spring. It would be pedantic to say, that *Gower v. Grosvenor* turns on the words "as far as the law allows;" for they are explained by the different natures of real and personal estates. (5) To do

(3) See 12 Ves. 285, 14 Ves. 478, &c.

(4) Lord Redesdale's notes observe that this, probably, alludes to the manner in which Mr. Barnardiston took his notes.

(5) Lord Thurlow here said, "If the words 'as far as law, &c., will permit,' are used to denote the intention of the testator that a settlement should be made, and not to denote the manner in which he himself devises the property, I must send it to the Master, now to make a settlement. The words mean of themselves every limitation which can be framed for the purpose of making property unalienable as long as may be." From Lord Redesdale's notes.

(a) See *Foley v. Burnell*, 1 Bro. C. C. 285, 286, a, notes (a) and (b): Atty. Genl. v. Hird, 1 Bro. C. C. 172, 173, 4 Kent (5th edit.), Lect. 60, p. 263.

what is called for in this case, I must go much further than ever has been done; for I know no instance where the conveyance has been carried to the utmost extent of what the law might do. I know conveyancers have endeavored to frame a case to the utmost extent it can be carried: but here it might be suspended to twenty-two years after a life in being. He certainly meant the son, if he was in possession, should have them. What, then, shall they not be in possession in the mean time, — not vest in any body? Cases which say you shall do all this for the testator, by saying you shall do all that can be done, will not do. This would be fetching the intent of the testator, in a way many cases have said it cannot be done. The property cannot be rendered inalienable but by preventing the use from springing; which cannot be when a person is born who would take absolutely. It would be a direction to keep it unalienable as long as could possibly be. I am of opinion that the words are not sufficient to give such a construction, and that, consequently, I must declare that this property vested in the son of Emma, and goes to the father as his representative.

*BROWNE v. SOUTHOUSE. Lincoln's-Inn-Hall, 3d July. [*107]

(Reg. Lib. 1789. A. fol. 588. b.)

Agent of an administrator keeping money of the intestate's in his hands which he had proposed to his principal to lay out in the funds, ordered to pay interest, (1) [with annual rents.] (2)

ELIZABETH WYVIL died 5th March, 1767, intestate, and without issue, possessed of considerable property, leaving Mary Wyvil, her sister, and only next of kin; who, at that time, and to the time of her death, was insane. William Wyvil obtained letters of administration, during the insanity of Mary Wyvil, and gave letters of attorney to the defendant Southouse, an attorney, to collect and get in the estate of Elizabeth Wyvil, and to lay the same out in the funds. He received several large sums, and, by letter, recommended to William Wyvil, that the moneys received should be laid out in the 3 per cents., which Wyvil acquiesced in by letter, 6th Feb. 1768; and informed the defendant, he should want no more of the money, and never afterwards made any demand upon him; the defendant, who, from time to time, informed Wyvil that he had laid out the money, received by him, in the funds or otherwise, but which the defendant, in fact, always kept. William Wyvil died about November 1780, and appointed the other defendants his executors. Mary Wyvil died about 5th April, 1786, intestate and insane, and left plaintiff, her aunt and next of kin, who obtained letters of administration *de bonis non* of Elizabeth Wyvil, and also administration of Mary Wyvil, and, in that capacity, filed the present bill, for an account, against the defendant Southouse, and the executors of William Wyvil, praying also interest for the sums which the defendant Southouse kept in his hands, and did not improve at interest.

(1) Vide *Newton v. Bennet*; *Perkins v. Baynton*; and *Treves v. Townshend*, ante, 1 vol. 359, 375, 384, with the Editor's notes; also *Littlehales v. Gascoyne*, ante, 73, and *Franklin v. Smith*, postea, 433; *Tebbs v. Carpenter*, 1 Madd. Rep. 290, &c., 304, &c. &c.

(2) "At what particular times he received any sums of money, and when he could have laid out the same." The Master was to make annual rests, on the balances in his hands, and compute interest on such annual rests, at the rate of 4 per cent. per annum. — R. L.

The defendant, by his answer, set forth an account of the moneys received and laid out; by which it appeared that he had, from time to time, large balances in his hands: but, with respect to the payment of interest, he made two defences. 1st. That he had received no orders or instructions to lay out the money. 2dly. That he had blended the money with his own, (a) and conceiving himself liable to account for, or pay the money, he kept sufficient by him, or in his banker's hands, for the purpose.

It was in evidence, that there was a loss, by the moneys received not being regularly laid out, of about 800*l*.

Lord CHANCELLOR said, that it was a clearly established point, that the defendant had received money, but that that would not have [*108] bound him, if he had not been under a duty to make interest of it for the benefit of the estate; because, then, it would only be holding the money as a banker holds it; but here was an employment, accepted by the defendant Southouse, to lay out the money from time to time. It is said, he is not liable, because an administrator is not bound to invest the moneys in his hands, so as to make interest, (b) but here he has bound himself. Therefore an account must be taken (2) of the times when he received moneys belonging to the estate, and when he ought to have laid them out, (c) and he must answer interest at 4 per cent. from the times when he ought to have laid them out. (d)

(2) See note (2) in the preceding page.

(a) See *Garniss v. Gardiner*, 1 Edw. 128; *Kellett v. Rathbun*, 4 Paige, 102; *Walker v. Woodward*, 1 Russ. 107; *Sutton v. Sharp*, 1 Russ. 146.

(b) See *Thompson v. Sanders*, 6 J. J. Marsh. 99; *Spruill v. Cannon*, 2 Dev. & Bat. Eq. 400; *Walton v. Avery*, ib. 405; *M'Caw v. Blewit*, 1 Bai. Eq. 98; *Dexter v. Arnold*, 3 Mason, 284; *Webb v. Conn. Litt. Sel. Ca.* 475. Generally, executors and administrators, and others, standing in like situations, are liable to pay interest on funds, which they have detained in their hands, unless they have retained the funds for purposes sanctioned by the law, *Pace v. Burton*, 1 M'Cord, Ch. 250; *Taveau v. Ball*, ib. 459; *M'Caw v. Blewit*, ubi supra; *Brown v. Vinyard*, 1 Bai. Eq. 460; *Lafont v. Ricard*, ib. 437; *Chemut v. Strong*, 2 Hill, Ch. 150; *Thomas v. Fred. Co. School*, 9 Gill & J. 115; *Arnett v. Linney*, Dev. Eq. 369; *Fowler v. Garret*, 3 J. J. Marsh. 681; *Dunscumb v. Dunscumb*, 1 John. Ch. 510; *Manning v. Manning*, 1 John. Ch. 620.

(c) See *Goodchild v. Fenton*, 3 Young. & Jer. 481; 2 *Williams*, Ex. Pt. 4, Bk. 2, ch. 2, § 2, p. 1132, 1133, and cases cited; *Fonhl. Eq. Bk. 2*, ch. 7, § 6, notes.

(d) See 2 *Williams*, Ex. Pt. 4, Bk. 2, ch. 2, § 2, p. 1134, and cases cited; *Treves v. Townshend*, 1 Bro. C. C. 384; *Newton v. Bennet*, 1 Bro. C. C. 359, 361, 362, and cases collected.

HARRISON v. NAYLOR.

[Vide S. C. 2 Cox, 247, 248, &c.] Lincoln's-Inn-Hall, 6th July.

(Reg. Lib. 1789. A. fol. 630. b.)

Testator gives legacies, to be raised by the means after pointed out; then directs an estate to be purchased, a sum to be raised for maintenance, and the residue of the rents to be applied to raise the legacies, and in default, makes the estate liable: The legacies are not personal, but a charge on the real estate; and one of the legatees dying an infant, the legacy shall not be raised for the administrator. (1)

THOMAS NAYLOR, by will, bequeathed 5000*l*. to his natural daughter, now Elizabeth Harrison, one of the plaintiffs, and 3000*l*. to his unborn

(1) See a much more full report of this case in 2 Cox, 247, &c.; from whence it appears there was another material point, which is there accurately stated.

child, to be paid them when they should respectively attain the age of twenty-one, unless on account of their misconduct, the trustees of his will should think fit to postpone the payment till they should respectively attain the age of twenty-four; and which legacies, he directed, should be collected and raised in the manner and by the means thereafter pointed out and explained. He then directed his executors, after satisfying all debts and legacies, to lodge and vest the remainder of his personal estate in bank stock: and desired them to purchase a certain estate, formerly belonging to his family, if the same could be purchased; and if it could not, to purchase some other freehold estate. And he, by his said will, gave and devised such freehold estate, when purchased, to his natural son Thomas Naylor and to the male heirs of his body for ever, and if he should die without issue male, then to the heir male of his natural daughter Elizabeth, provided he assume the name of Naylor; but if his said natural daughter should have no issue, then to her next heir-at-law, provided he assume the name of Naylor. He then directs the sum of 225*l.* per annum to be applied out of the rents and profits of his said estate, for and towards the maintenance of his said children; and directed and required the executors to apply the residue and the remainder of the rents and profits of the said estate to the purpose of raising and providing the legacies *thereby given to his said natural children: and [*109] if the said rents and profits proved insufficient, then he made the estate, so to be purchased, chargeable with the payment of the same, or the remainder thereof.

The child, who was unborn at the time of the testator's making his will, died an infant, and administration was obtained by authority of a sign manual. Elizabeth intermarried with plaintiff, Harrison; but there was no issue of the marriage. The bill prayed directions and execution of the trusts.

Mr. *Mansfield*, for the plaintiff. The money to be laid out in the purchase of a freehold estate, is that which shall remain after payment of debts and legacies.

When the legacy has lapsed by the death of the legatee, on account of its being charged upon a real estate, the estate has been in the possession of the testator at the time of his death; whereas this, if it be to affect real estates, is a charge on an estate to be purchased: but we contend that it is charged on the personal estate, and that the real is not to be purchased till the legacies are paid. The testator intended his estate to be so limited, as to secure an estate to the male heirs of Thomas Naylor, and, in failure of them, to the male heirs of Elizabeth; for which purpose the plaintiffs submit, that the conveyance ought to be to Naylor for life, in strict settlement; the remainder to the heirs male of Elizabeth.

Mr. *Solicitor-General*, for defendant Naylor, submitted, that the legacy was to be considered as charged upon land; and the legatees having died before the same was raisable, that the same sinks into the land. (a)

It is admitted the legacy is in *presenti*, though *solvendum in futuro*.

By the words, "the legacies to be collected and raised in manner after-mentioned," the testator cannot be considered to have intended the legacy

(a) 2 Williams, Ex. Pt. 3, Bk. 3, ch. 2, § 5, p. 780, 781; Ram on Assets, ch. 6, § 14, p. 127, 128, and numerous cases cited, ch. 14, § 2, p. 211, 212. See *Birdsall v. Hewlett*, 1 Paige, 32; *Marsh v. Wheeler*, 2 Edw. 156.

This seems to be otherwise, where the payment of the legacy, charged on real estate, is postponed for the convenience of the estate, or of the person charged with the payment of the legacy; *Harris v. Fly*, 7 Paige, 421; *Goulbourne v. Brooks*, 2 Young. & Coll. 539.

should be paid out of the personal estate before the purchase of the real, he having afterwards charged the real. His intention seems to [*110] have been, that his estate should be settled upon his son, charged with the legacies to his other children, and the 225*l.* per annum for their maintenance and education.

Where a legacy is given by a stranger, charged upon land, though with interest, if the legatee dies, it will sink into the land, *Gawler v Standewicke* (ante, v. i. p. 106); but there can be no doubt, where it is given by a father by way of portion, this Court will not charge the estate with it, if the child dies before he wants it. It is clear, that the testator here was anxious to provide an entailed estate in his family.

LORD CHANCELLOR.—I thought at first it was a mere personal legacy; but I doubt, upon the whole, whether it must not be considered as charged on the land, the testator having referred to the manner in which it is to be raised, and having afterwards provided for the payment of it, by charging his real estate. (a) The moment the money ought to be laid out in land, it must be considered as a real fund, and therefore within the common rule.

The conveyance was therefore directed to be to Thomas Naylor (2) in tail male, remainder to trustees to support contingent remainders; remainder to the heirs male of Elizabeth; (3) and if she should die without heirs male, remainder to the heirs male of the testator in fee. (4) (b)

(2) The decree in R. L., directing a settlement on "T. L. and his heirs, in tail male," is not agreeably to the directions given by Lord Thurlow, or to the object he had clearly in view. See it noticed in *Habergham v. Vincent*, 2 Ves. jun. 234, 235, and *Stansfield v. Habergham*, 10 Ves. 281, note.

(3) "In fee."—R. L.

(4) See this approved of, subject to the observations in note (2), per Lord Eldon C. 10 Ves. 281.

(a) See *Ram on Assets*, ch. 6, § 2, p. 89, &c., and cases cited.

(b) The following account of the other point in this cause is given by Mr. Cox:—"As to the second question, his Lordship said it was impossible to argue against Thomas Naylor's having an estate tail in the estates to be purchased; but, as there were remainders over, the money must be invested, and the land settled, to the use of Thomas Naylor, and the heirs of his body, with a contingent remainder to the person, who should answer the description of heir male of Elizabeth Naylor, at the time of her death in tail, with remainder to the right heir of the testator. Mitford then suggested, that, as this was an executory trust, the Court would interpose, after the estate tail in Thomas Naylor, a limitation to trustees to preserve the contingent remainders to the heir male of Elizabeth, &c. And his Lordship was of opinion, that such a limitation should be inserted. His Lordship declared, that the uses were to be to Thomas Naylor and his heirs in tail male, with remainder to trustees to support contingent remainders; remainder to the heirs male of Elizabeth Harrison in fee, and if she should have no heirs male, then to the heir-at-law of the said testator in fee. *Reg. Lib. A. 1789*, fol. 632. See the notice taken of this by Wilson J., and Buller J., in *Habergham v. Vincent*, post, vol. iv., and particularly by Lord Eldon in *Stansfield v. Habergham*, 10 Ves. 280. Mr. Vesey, in a note (ib.) observes, that in a subsequent branch of this cause the Master of the Rolls noticed the inaccurate language of the decree as it stands in the Registrar's book in the limitation to Thomas Naylor and the testator's natural son and his heirs in tail male. — *Eden*.

CAREY v. GOODINGE [WYN]. Lincoln's-Inn-Hall, 7th July.

(Reg. Lib. 1789. A. fol. 507. b.)

Testator gave his brother and nephew legacies, and appointed them executors, but did not dispose of the residue. They were indebted to him in unequal sums; this is no release of the debts, (1) and they are trustees for the next of kin, as to the residue. (1)

Good[wYN,] the testator, by will dated June, 1783, gave to the defendant, his brother Henry Goodwyn, 500*l.*, and to his nephew, the defendant, Henry Goodwyn, jun. 500*l.*, (2) and appointed them executors, but made no disposition of the residue. He also wrote a letter (3) to the nephew, in which, among other things, he referred him to certain letters in Chambers's dictionary as worth looking for, and directed him to pay the plaintiff, Carey, 200*l.*

*Henry Goodwyn, the brother, was indebted to the testator [*111] 7000*l.*, and Henry Goodwyn, jun. was indebted to him 1000*l.*, at the time of decease. Upon searching the titles referred to in Chambers's dictionary, bank notes were found to a considerable amount.

The bill was by the next of kin, and prayed an account of the personal estate of the testator, and particularly of the sums in which the executors were indebted to him, and payment of the same to the plaintiffs.

Mr. *Solicitor-General*, and Mr. *Mansfield*, for the defendants, contended; 1st. That the appointment of the brother and nephew executors, is an extinguishment of the debt. This is clearly so at law; and there is no case, in this Court, where it has been held otherwise, except where there has been a direct gift of the residue. That was the case, in *Brown v. Selwyn*, For. 240, and even there, Lord Talbot spoke of it as an undecided point: but there is no case where it has not been held an extinguishment against the next of kin.

2d. That, having (by this mean) unequal legacies, and there being no disposition of the residue, the brothers as executors were entitled to it. That by appointing them executors, the testator had shown his intention of giving them the personal estate: that he had not left it here to the mere appointment, as the letter to the nephew was not unimportant; (4) the reference to the parts of Chambers's dictionary, where the notes were found, is tantamount to saying, you will pay Carey 200*l.* out of the notes, and will take the remainder. It is inconsistent with the idea of their being executors in trust.

Lord CHANCELLOR said, he thought it had been a settled point in this Court, that the appointment of the debtor executor, was no more than parting with the action: (a) and declared it a trust for the next of kin. (a)(b)

(1) See *Berry v. Usher*, 11 Ves. 87, &c.; *Phillips v. Phillips*, 1 Ch. Ca. 292, and *Yelv.* 160; *Brown v. Selwin*, Forr. 240, &c.; Vide etiam *Hargr. C. Lit.* 264 *b.* note (1).

(2) And to each of his children 100*l.* a piece, with various other legacies. — R. L.

(3) Some part of this letter (which was proved as a testamentary writing), seems very material in favor of the executors, and against the decision. It was as follows: "As I design shortly to make a new will, wherein I shall devise my H. estate to you, and after your decease, to your son, &c., I hope your father will make no objection to this my last request; and as you are both joint executors to this my last will, that you will pay J. Carey, Esq., 200*l.* on my account. In Chambers's Dictionary you will find (mentioning the titles), something worth looking for. Wish you health and happiness, being your affectionate uncle, W. G."

(4) See the letter from R. L. in the preceding note, and the Editor's observations.

(a) *Wankford v. Wankford*, 1 Salk. 299; *Winship v. Bass*, 12 Mass. 199; *Stevens v. Gaylord*, 11 Mass. 266; *Hays v. Jackson*, 6 Mass. 149; *Bigelow v. Bigelow*, 4 Ham. 138;

(b) See note (b) in the next page.

Freakley v. Fox, 9 Barn. & Cress. 130; *Lockier v. Smith*, 1 Keb. 313; *Cocks v. Borradaile*, Chitt. & Hal. 642, n.; *Kinney v. Ensign*, 18 Pick. 232, 236; *Hobart v. Stone*, 10 Pick. 220; *Ritchie v. Williams*, 11 Mass. 50; *Ips. Manuf. Co. v. Story*, 5 Metcalf, 310; *Bacon v. Fairman*, 6 Conn. 121; 2 Story, Eq. Jur. ch. 33, § 1209; *Berry v. Usher*, 11 Ves. 90; 2 Williams, Ex. Pt. 3, Bk. 3, ch. 2, § 9, p. 811, &c.; *Pusey v. Clemson*, 9 Serg. & Rawle, 208; *Ram on Assets*, ch. 8, § 2, p. 150; *Hall v. Hall*, 2 McCord, Ch. 304; *Decker v. Miller*, 2 Paige, 149; *Stagg v. Beekman*, 2 Edw. 89; *Marvin v. Stone*, 2 Cowen, 781; *Thomas v. Thompson*, 2 John. 471.

(b) For the cases and doctrine, in reference to executors being trustees for the next of kin, see *Martin v. Rebow*, 1 Bro. C. C. 155, note (a); *Bowker v. Hunter*, 1 Bro. C. C. 334, and notes; *Dean v. Dalton*, 2 Bro. C. C. 636, and the American doctrine stated, and cases cited in the notes.

[*112] *KEBLE v. THOMPSON. Lincoln's-Inn-Hall, 7th July.

(Reg. Lib. 1789. A. fol. 484. b.)

One trustee suffering the other to have trust-money, (1) under a note of hand, (2) held liable.

THOMPSON and Pyefinch were co-trustees. A sum of 1036*l* was paid to Pyefinch, on account of the trust fund, he lent it to Thompson, and took a note of hand.

Pyefinch and Thompson were both become bankrupts.

LORD CHANCELLOR said, if a trustee will suffer a co-trustee to obtain a sum of money belonging to the trust estate, they are both liable: and ordered the debt to be proved against both estates. (3)(a)

(1) Vide *Sadler v. Hobbs*, ante, 1 vol. 114, and *Scurfield v. Howes*, ante, 90, with the Editor's notes; *Underwood v. Stephens*, 1 Meriv. 712, &c. { 2 Story, Eq. Jur. ch. 33, § 1234, and notes and cases cited. }

(2) See also *Wilkes v. Steward*, and *Langston v. Olivant*, Cooper, Ca. Ch. 6, & 32.

(3) And his Lordship refused Pyefinch and his assignee their costs. — R. L.

(a) Though it seems at one time to have been thought not to have been a breach of trust in executors or trustees, lending money upon personal security, *Harden v. Parsons*, 1 Eden, 145, yet the contrary is now distinctly established, *Ryder v. Bickerton*, 1 Eden, 149, n.; *Adye v. Feuilletau*, 1 Cox, 24; *Wilkes v. Steward*, Coop. Ch. Rep. 6. As to the cases upon the general doctrine of the liability of trustees and executors, vide *Sadler v. Hobbs*, ante, vol. ii. 114; *Scurfield v. Howes*, ante, 90; *Rowth v. Howell*, 3 Ves. 555; *Knight v. Lord Plymouth*, cit. ib.; *Hovey v. Blakeman*, 4 Ves. 596; *Bacon v. Bacon*, 5 Ves. 331; *Adams v. Claxton*, 6 Ves. 236; *Caffrey v. Darby*, ib. 488; *Chambers v. Minchin*, 7 Ves. 186; *Doyle v. Blake*, 2 Sch. & Lef. 231; *Brice v. Stokes*, 11 Ves. 319; *Langford v. Gascoyne*, ib. 333; *Wren v. Kirton*, ib. 377; *Lord Shipbrook v. Lord Hinchinbrook*, 16 Ves. 477; *Tebbs v. Carpenter*, 1 Madd. Rep. 290; *Underwood v. Stevens*, 1 Meriv. 712. — *Eden*. { A trustee, who stands by and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust. *Booth v. Booth*, 1 Beavan, 125. See also cases collected in notes to *Sadler v. Hobbs*, 2 Bro. C. C. 114; *Mumford v. Murray*, 6 John. Ch. 16, 452. }

The Earl of ABINGDON v. BUTLER and Another.

Lincoln's-Inn-Hall, 9th July. [Vide S. C. 1 Ves. jun. 206, and 2 Cox, 260.]

(Reg. Lib. 1789. A. fol. 502.)

The tenant having by misrepresentation and collusion (1) with the plaintiff's steward obtained a renewal of a lease for lives as if one only had dropped, and two were to be exchanged, when in fact two lives had fallen, decreed to pay the value of the two lives; and shall not have the option of delivering up the new, and abiding by his former lease.

THE plaintiff being seised for life of the manor of Cumner, in the county of Berks, with a power of leasing for twenty-one years, or three lives in

(1) Vide (inter alia) *Beaumont v. Boulthbee*, 7 Ves. 599, 610, 611.

being: by lease dated 24th October, 1766, demised certain premises therein described, and being part of the said manor, to John Godfrey, to hold for the term of ninety-nine years, if the same John Godfrey, Bertie Thomas Egerton, and Jane Polly Egerton, or either of them, should so long live, under the rents therein reserved; this lease by mesne assignments came into the possession of the defendant Ralph Butler.

In 1780, John Godfrey died, and in 1785, Bertie Thomas Egerton died, by which the interest of the defendant Ralph Butler was reduced to one life only, viz. that of Jane Polly Egerton.

The defendant Butler, in 1786, being desirous of obtaining a new lease, and of substituting the names of his three sons, William Butler, Ralph Butler, and John Butler, for the lives of the persons deceased, and for that of Jane Polly Egerton; applied to the defendant Penson, who was then steward to the plaintiff of his manor of Cumner, to settle terms for the renewal of the lease. The bill charged, that both the defendants knew at the *time that Bertie Thomas Egerton was dead, as [*113] well as John Godfrey; but this was denied by the answers.

The bill also charged that the rule, which the steward had always followed in renewal of leases in the said manor, had been, to assess one year's purchase for changing a life, and seven years' purchase for adding two lives to one, according to the yearly value appearing in a book in the possession of the defendant Penson. And that it appeared by the said book, that the estate comprised in the said lease was valued at 102*l.* per annum, but that the defendants agreed that the fine should be assessed as if Bertie Thomas Egerton was living, which would only be adding a life in the place of John Godfrey; and it appearing to be the practice, that the fine upon adding one life to two, was two years' purchase, the defendants agreed that the fine should stand at 200*l.* as if two lives had been in being, and that nothing should be paid for exchanging the lives of Bertie Thomas Egerton, and Jane Polly Egerton, for those of two of the sons of defendant Butler. The matter being thus represented to the plaintiff (though the exchange of two lives, and the renewal of the other were entered in the contract book), and the sum of 200*l.* being accordingly paid, plaintiff executed a lease bearing date 19th October, 1786, of the premises, to the defendant Butler, for the term of ninety-nine years, if William Butler, Ralph Butler, and John Butler (sons of defendant Butler, or either of them, should so long live); that the defendant Butler called upon the plaintiff in town for the lease, which was delivered to him, but the defendant did not inform the plaintiff, that Bertie Thomas Egerton was then dead.

The plaintiff, afterwards, discovering that Bertie Thomas Egerton was dead at the time of granting the lease, applied to defendant to pay him the difference of the fine as upon the substitution of two lives, which the defendant refused.

The original bill had prayed that the lease might be delivered up to be cancelled [on repayment of the said sum of 200*l.* which the plaintiff offered to repay.]

The defendant by his answer, (1) submitting to deliver up the new, and to abide by his old, lease, upon repayment of the 200*l.* actually paid.

(1) Admitted, that before he took away the lease he knew of the second life having dropped, and that he did not acquaint the plaintiff of the fact, but he denied any knowledge of the fact at the time of his contract for the lease. From Mr. Cox's MS. notes. The like also appears in Mr. Cox's Rep. 261.

It appears by the report of the judgment, in 1 Ves. 209, 210, that the Lord Chancellor held that the plaintiff lost the benefit of those admissions by the amendment of his bill. If, however, amendments are to matters merely collateral, a defendant will be bound by his former admissions. Vide *Spurrier v. Lady Fitzgerald*, 6 Ves. 548, 556.

[*114] *The plaintiff amended his bill, (2) and prayed that it might be declared, that the lease was fraudulently obtained, and that the defendant Butler might [either] be decreed to pay to the plaintiff the further sum of 616*l.* or such sum as the Court should think a fit consideration for the renewal [or to deliver up the said lease on repayment of the said sum of 200*l.*]; and in default of payment by defendant Butler, that defendant Penson might be decreed to pay the same.

On the part of the plaintiff, Mr. *Attorney-General* contended, that as the defendant had pressed for the execution of this contract, upon grounds which he knew to be false, he was bound to abide whatever might be the real value of the contract, upon a reference to the Master.

He also contended, that the suit was made necessary, even to the point of rescinding the contract, by the defendant's refusal either to abandon the lease, or to pay the just value of it.

The plaintiff read a deposition, proving this refusal; and he also read the admission of the defendant in his answer, that soon after the execution of the lease, he called upon Lord Abingdon, and concealed the fact that another life had dropped; alleging, as a reason for that concealment, his fear of losing the 200*l.* unless he had the estate as a security for it.

Lord CHANCELLOR said, he had some doubts whether the fraud imputed, was proved; that is, whether there was fraud in obtaining the lease.

Mr. *Hardinge*, of the same side with the *Attorney-General*, insisted that the lease was, in a correct sense of the word, *obtained* by fraud; though perhaps that fraud may have originated after the execution of the instrument: but, that, before the delivery of it, the defendant, in the very moment of asking for it, concealed a fact, which, if the lessor had known, he would have countermanded the direction to deliver the instrument: that he obtained it, therefore, that is, obtained the possession and advantage of it, by a palpable cheat.

The Lord CHANCELLOR immediately adopted this reasoning, and then stated his doubts, whether the plaintiff was not entitled, even to an [*115] option, according to his amended bill, between *rescinding the contract, and upholding it upon payment of the value of the difference.

Mr. *Solicitor-General* argued, that no such thing was ever done, and that reinstatement of the parties in their condition before the contract, was the single equity that could be reached in cases of the most unqualified fraud: that the Court never punished fraud in one contract actually made, by forcing upon the author of that fraud another contract, which he never dreamed of making.

Then, as to the reinstatement, he insisted that it was offered by the defendant, in his answer to the original bill; that the plaintiff, instead of accepting the offer, had filed a new and amended bill, widening his equity, insisting upon the option, and claiming to establish the lease upon a new valuation; though his original bill affected only to rescind the contract, and though he had himself made an offer to the defendant, prior to the bill, upon the idea of merely reinstating the parties. He argued, therefore, that the plaintiff should pay his own costs of the amended bill.

Lord CHANCELLOR (3) held, that as the fraud was in the article of price,

(2) And after stating that the value of the new lease was in fact 616*l.* beyond the money actually paid, which was but 200*l.*, it prayed, &c. From Mr. Cox's notes.

(3) See the judgment in 2 Cox, 262, and more especially in 1 Ves. jun. 206 - 210.

and the estate acquired by that fraud, the person defrauded had an equity in correcting the value, and compelling the person, who had so defrauded him, to pay it. He adverted to a case from Ireland, in which he had laid down the same rule, and acted upon it; but he could not recollect the name or the particular facts.

It was then contended, by Mr. *Abbot*, as counsel for Penson, the agent, that the bill ought to be dismissed, against him, with costs; no fraud in him, as to this contract, having been proved.

But the plaintiff's counsel read Penson's admission, that he had stated in a letter to Lord Abingdon, the contract as only having been for adding one life; when, in truth, according to his own statement, it was for adding one life, and changing two, which made a very material difference in the real value.

*Mr. *Abbot* answered, that he had stated the fact in the con- [*116] tract book, as it really was, which book, Mr. *Estwicke*, the Auditor, might have seen, but would not examine; so that, by mistake in the audit account, the fact was incorrectly described.

But the Lord CHANCELLOR said, the entry in the audit account must have originated with him, and was a palpable fraud. He should, therefore, not only make him pay his costs, but also the additional value of the estate, if the other defendant could not pay it.

The decree was, (4) that an account should be taken of the value of the lease, at the time of its execution; that the defendant Butler should pay that value with the costs of the suit; and that, in default of his payment, the deficiency should be made good by Penson, the other defendant, who should pay his own costs.

(4) The Master was to inquire what was the value of the addition to the estate, beyond the sum of 200*l.* paid by the defendant R. Butler to the plaintiff, and he was to compute interest on what he should find was the value of the addition to the estate beyond the said sum of 200*l.*, after the rate of 4 per cent., from the 19th of October, 1786. Butler was to pay that amount with the plaintiff's costs to be taxed; and in case he did not pay the same, the defendant Penson was to pay the same to the plaintiff. — Reg. Lib.

WARDELL v. WARDELL. Lincoln's-Inn-Hall, 9th July.

(Reg. Lib. 1789. B. fol. 635.)

Testator, by his will, taking notice that he had not surrendered copyhold estates, which he devised, but directing his son to convey them, and devising to the son other estates, though the copyholds are not devisable by custom, yet the surrenders decreed to be made. (1)

TESTATOR, having limited several copyhold estates upon certain trusts, observes, that, "Whereas I have omitted to do or put proper surrenders, or other proper acts of and concerning some part or parts of my copyhold and customary lands, hereditaments, and estates, to the use of my will, or otherwise, to enable me to dispose of the same by my will, and for want thereof the same will descend to my son John, as my heir-at-law, contrary to my intention and this my will: now I do hereby will, order, and direct, that my said son John, or his heirs, when or as soon as he or they shall attain the age of twenty-one years, shall and do, upon request and charges in the law of the persons interested and requesting the same, pass suffi-

(1) See *Furnaker v. Robinson*, 1 Eq. Ca. Ab. 123; *E. Godolphin v. Penwek*, 2 Ves. 271, and *Pike v. White*, postea, 286; and vide *Warde v. Warde*, Ambler, 299.

cient surrenders, and do all other acts in law required and necessary, for establishing and confirming the several estates herein limited to them respectively; and that, in default thereof, or upon refusal or neglect so to do, the estate herein limited or appointed to my said son John and the heirs of his body, shall immediately from thenceforth cease and determine, and the several remainders thereupon expectant shall successively take effect in possession, in the same manner *and to all intents and purposes as if my son John was actually dead without issue; and that, in the mean time, and until such refusal or neglect, the said copyhold and customary estates shall go, be held, and enjoyed according to this my will."

The customary estates not being devisable, it was insisted the Court could not decree a surrender.

Lord CHANCELLOR was clearly of opinion that, though they were not devisable by the custom, yet, as the testator might dispose of them, and had marked his intention so to do, that brings it within the principle upon which the Court proceeds in supplying surrenders for payment of debts or provisions for younger children, which are considered as meritorious considerations; and decreed the surrenders prayed by the bill.

CROWE v. BALLARD.

Lincoln's-Inn-Hall, 15th July. [Vide S. C. 1 Ves. jun. 215, and 2 Cox, 253.]

(Reg. Lib. 1789. A. fol. 608. b.)

An agent employed to sell a reversionary legacy, buys it in the name of another, and afterwards sells it to the legatee, for a bond payable after death of his father, and then obtains from him a money-bond: the whole transaction is fraudulent; and the giving the bond and payment of interest, no confirmation. (1)

THE late Lord Litchfield, by his will, made in the year 1774, gave to the plaintiff, Robert Crowe, a legacy of 1000*l.*, to be paid him at the death of Lady Litchfield. Lord Litchfield died in the year 1776, leaving Lady Litchfield his widow, aged sixty-nine years or thereabout. The plaintiff Robert Crowe, being then a young man about twenty-two years of age, and having pressing occasions for money, the defendant undertook, as his agent, to sell the legacy to the best advantage; and informed the plaintiff that he had endeavored to sell the same, but could get no offer higher than 300*l.*, for which he had sold the legacy to a Mr. Toft, to whom the plaintiff, on the defendant's representation, executed an assignment. In fact, Toft was only a nominal purchaser, and the defendant really purchased the legacy. The money was paid by small sums, between 1st of October, 1777, and the 23d February, 1770, to the plaintiff Robert, his brother, the other plaintiff, George, and to Mr. Seally, the plaintiff George's tutor, viz. 30*l.* to George Crowe, 100*l.* to Robert Crowe, 20*l.* to George Crowe, 50*l.* in satisfaction of a draft of Robert, and to Mr. Seally, at different times, 60*l.*, 10*l.*, and 49*l.* 10*s.*, which last payment however, was contradicted by him in his evidence. Afterwards, in 1780, [*118] Lady Litchfield being likely to die, and the plaintiff fearing his *sale of the legacy would come to the knowledge of his father, he ap-

(1) Vide 1 Ball and Beattie, 339, 353, Supplement to Vesey, 297, &c., and Fox v. Mackreth, *ante*, 2 vol. 400, with the Editor's notes.

plied to the defendant, and requested him to apply to Toft to know what sum, payable at the death of his father, George Crowe, sen., he would take for his interest in the legacy: when the defendant told him that Toft had quitted the kingdom, or was dead, and that his interest in the legacy had become the property of himself, the defendant, and, pretending great friendship to the plaintiff, at length agreed to give up his right to the legacy, upon receiving the joint security of the plaintiffs, Robert and George Crowe, for the sum of 1800*l.*, payable at the death of George Crowe, sen. (who was then of the age of sixty-three years); whereupon a *post-obit* bond was entered into, and executed by the plaintiffs to the defendant, dated 25th April, 1780, in the penal sum of 3600*l.*, with a condition underwritten, reciting that the plaintiffs stood indebted to defendant in 900*l.* conditioned for payment of 1800*l.*, in case they or either of them, the plaintiffs, should survive the father, within three months after the father's death: but, in fact, no such debt of 900*l.* subsisted at the time. In October, 1782, the plaintiff's father died, and the plaintiff Robert came into possession of a fortune of 3000*l.* a year, and, in the month of January, 1783, the defendant applied for payment of the bond, but the plaintiffs being unable to pay it, and defendant threatening a suit, a money-bond was given for the 1800*l.*, and interest at 5 per cent. bearing date 10th October, 1782; since when, the plaintiff Robert had paid four years' interest on the bond, to the month of October, 1786, and the defendant, having sued out process to arrest the plaintiffs; they filed this bill 18th May, 1787, praying that, upon payment of the money really advanced, the defendant might be decreed to deliver up the bond to be cancelled, and might be restrained by injunction from proceeding at law, and therein charged that the legacy at the time of the sale was really worth, to a purchaser, 741*l.* 12*s.* 8*d.*, calculating the life of Lady Litchfield to be worth six years $\frac{1}{4}$ th purchase, and allowing the purchaser 5 per cent. per annum, and compound interest for his money; therefore, that the sum of 300*l.* was 441*l.* 12*s.* 8*d.* below the value.

Mr. *Solicitor-General*, Mr. *Lloyd*, and Mr. *King*, for the plaintiffs, stated the case, and the general value of the life, and the sums paid, to show the inadequacy of the price given for it. *They [*119] also insisted on the general rules of relieving persons who treated in this way for their expectations, and who were held by the Court entitled to its interference. That, here, the first transaction was manifestly fraudulent and unconscionable: 2dly, that the money-bond, though after the death of the father, could not be considered as a confirmation: that, in order to be so, it should be done freely, and not under the influence of the prior transaction; for this they cited *Chesterfield v. Janssen*, (2) 2 Vesey, 125; *Cole v. Gibbons*, 3 Wms. 290, citing *Curwen v. Milner*, in the note on page 292; *Norris v. Rodd*, 16th March, 1779, where the plaintiff, in consideration of 2000*l.*, sold to defendant an annuity of 435*l.* for the life of plaintiff, payable upon the death of his father (aged seventy-one years), if plaintiff and defendant should survive him: in October, in the same year, the father died, and, upon the first payment becoming due, defendant applied for it, and plaintiff not being able to pay it, obtained from plaintiff a mortgage of his estate in possession and reversion, it being chiefly his mother's for life, for 421*l.* (4000*l.* being for the 2000*l.* really advanced, and 212*l.* for the half-year's annuity due: in 1775); the plaintiff filed his bill, and was relieved against the grant, bonds, and mortgage.

(2) Vide Supplement to Vesey, 297, &c. &c.

Mr. *Mansfield*, and Mr. *Scaife*, for the defendant, argued, that, from the secrecy necessary, from the fear plaintiff had of his father's hearing of the plaintiff's design to sell the legacy, a larger price could not be obtained for it: that it had been offered to several persons, but no one had offered more. With respect to the value, the sums were calculated for certain interests, and with the contingency of the plaintiff's dying before their father. With respect to the confirmation; if the confirmation, in this case, does not prevail, there never can be a confirmation. In *Chesterfield v. Janssen*, the transaction was held to be affirmed; and the cases where it has not been so, have been cases of great distress, and where the distress has continued at the time of the confirmation. This was the case both in *Curwen v. Milner*, and in *Norris v. Rodd*.

Lord CHANCELLOR. This case lies in a narrow compass. The plaintiff was a young man entitled to a legacy of 1000*l.* upon the death of Lady Litchfield, who was 69 years of age. Ballard undertakes to sell [*120] the legacy, and pretends he took great pains so to do; but it is in evidence, that he represented it as a very hazardous business. Then he buys it himself. This is alone sufficient to set aside the transaction. It is impossible, at any rate, that the person employed to sell can be permitted to buy. (3) Even if this was done with the knowledge of the party selling, it could not be supported. That principle must prevail, even if he had bought fairly. (a) He paid the money, as advanced by the person who had purchased. The whole, according to his own answer, was 310*l.*; of this 49*l.* is denied. It is as oppressive a transaction as can be conceived. Then, the consideration of the *post-obit* bond: (b) then, as to the subsequent bond being a confirmation, I am at a loss upon what principle courts have spoken of confirmations. If a gentleman of rank, fortune, and honor, under age, in distress, or otherwise, gives a bond, and afterwards conceives that he has made a hard bargain; and, knowing that the bond is bad, will give a new bond, that will maintain the possession of the right of the holder of the bond, and this act shall be said to be a confirmation; but not any act done under the influence of the former transaction, and the opinion that that bond is good. (4) Here the bond was not given freely, but under the influence of the former transaction. (c) I do not remember the case cited by Mr. King (*Norris v. Rodd*), but it must have proceeded on the same ground with this. The confirmation from payment of interest is of no avail, being still under the same impression. I am clearly of opinion the transaction

(3) See *Fox v. Mackreth*, ante, 2 vol. 400, &c., Supplement to Vesey, 11, 12, citing 6 Ves. 617, 625, 630: 8 Ves. 337, 348, &c.; 14 Ves. 517, &c.

(4) *Murray v. Palmer*, 2 Scho. and Lefroy, 486; *Coles v. Trecothick*, 9 Ves. 234. But in the case of *post-obit* transactions, vide *Evans v. Chesshire*, Supplement to Ves. 300, with the previous observations upon *E. Chesterfield v. Janssen*, *ibid.* 297, 298, &c.

(a) See cases cited in notes to *Fox v. Mackreth*, 2 Bro. C. C. 400; 1 Story, Eq. Jur. ch. 6, § 239, note and cases cited; *ib.* ch. 7, § 315; 3 Sugden Vend. & Pur. (6th Am. edit.) 188, [237] et seq.

(b) See *Boynton v. Hubbard*, 7 Mass. 112, where will be found a full exposition of this subject, by Chief Justice Parsons; 1 Story, Eq. Jur. ch. 7, 343, and notes; *Gwynne v. Heaton*, 1 Bro. C. C. 1, and cases collected in the notes; *Heathcote v. Paignon*, 2 Bro. C. C. 167.

(c) See 1 Story, Eq. Jur. ch. 7, § 306, § 345, and notes and cases cited; *Stephens v. Lord Bateman*, 1 Bro. C. C. 22; *Gwynne v. Heaton*, 1 Bro. C. C. 1, and cases cited in the note upon this point of confirmation. See also *Carpenter v. Heriot*, 1 Eden, 338; *Morse v. Royal*, 12 Ves. 355; *Murray v. Palmer*, 2 Scho. & Lef. 486; *Roche v. O'Brien*, 1 Ba. & Be. 330; *Wood v. Downes*, 18 Ves. 120; *Dunbar v. Fredennick*, 2 Ba. & Be. 304; *Belton v. Briggs*, 4 Desaus. 465; *Butler v. Haskell*, 4 Desaus. 712-714; *McCants v. Bee*, 1 McCord, Ch. 383, 391; *Cherry v. Newson*, 3 Yerger, 369; *Cockerell v. Cholmeley*, 1 Russ. & My. 418; 1 Sugden, Vend. & Purch. (6th Am. edit.) ch. 4, § 5, art. 29, &c. p. 287, [392] et seq.

must be set aside, find the bond delivered up: the Master must take an account of what is due between the parties, and the defendant must pay costs.

The Countess Dowager of SHREWSBURY v. the Earl of SHREWSBURY.

Lincoln's-Inn-Hall, 10th & 11th Dec. 1789. Reheard, Lincoln's-Inn-Hall, 19th July, 1790. [S. C. 1 Ves. jun. 227.]

(Reg. Lib. 1789. A. fol. 414.)

Tenant in tail, but restrained by act of Parliament from suffering a recovery, (1) pays off portions charged on the estate, without taking an assignment; he shall be a creditor for the sums paid, which shall be raised for his administratrix. (2)

THE Duke of Shrewsbury, in 1700, made a voluntary settlement of his estate [after limiting it for the benefit of himself and issue] on George Talbot, father of the late Earl of Shrewsbury, for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons in tail male, with remainders over, remainder to himself in fee, and made a *will confirming the settlement. In 1788, the [*121] said George Talbot married, and a settlement was made, by which the estate was settled, as to the entail, according to the Duke's settlement, but there was a clause to raise 20,000*l.* for daughters, by a trust-term created for that purpose. In 1719, the late earl (who was the eldest son) was born. By a private act of Parliament, 6 Geo. 1, 1720, the marriage settlement was confirmed, and the estate was settled on such persons upon whom the earldom should descend: and the act contained a clause that Gilbert, then Earl of Shrewsbury, the said George, or John Talbot, should not alien, grant, or convey the premises thereby settled, or any part thereof; and that every fine, alienation, &c. should be void: but the act contained a proviso, that neither the first nor other sons of the said George Talbot, or of John Talbot, or the heirs male of their bodies, who should, within six months after he or they should attain the age of eighteen years, take the oaths of supremacy and allegiance, and should from thenceforth continue a Protestant, until he or they should attain his or their age or ages of twenty-one years, should be disabled from alienating the same: and the said act also contained a proviso, by which the said George Talbot was empowered, in case he should have issue a son, and also a younger child or children, by deed or will, to create a trust-term of ninety-nine years, for raising 15,000*l.* for the portions of daughters, and 200*l.* per annum for each younger son. In June, 1720, George Talbot, having a son born, executed the power, by deed, for raising these portions and annuities, by vesting a term of ninety-nine years in Lord Fitzwilliam and George Pitt; and, by will, in February following, reciting that he had a son and daughter born, and might have more (without taking notice of the deed), devised to other trustees, for a term of ninety-nine years, to raise the portions and annuities. In the deed, they were

(1) See the Duke of Marlborough's case, 3 Madd. R. 498, &c.

(2) Vide S. C. on the rehearing, 1 Ves. jun. 227. The Profession will find the several previous cases and the principle distinctly expounded by Lord Eldon C., in *Ware v. Polhill*, 11 Ves. 257, &c., 274, et seq., in which his Lordship refers to the principal case as marking the doctrine, that a tenant in tail under any disability of alienation is considered but as a tenant for life. Vide etiam, *Jones v. Morgan*, ante, 1 vol. 206, and the Editor's note; and 1 Ball. and Beattie, 142.

to be raised by rents, profits, or by sale or mortgage; by the will, by rents and profits only. George Talbot died in 1733, leaving several sons and three daughters, of whom George, the eldest (the late earl), became seised of all the real estates, as first remainder-man in tail under the settlement of 1718, and the act of Parliament confirming it; but subject to the restriction in the act as to alienation, unless he should conform within six months after attaining eighteen years of age, which he did not. The eldest daughter, Barbara, married the late Lord Aston, and, before marriage, executed a release of her portion of 5000*l.*, on its [*122] being paid, by the late *earl, to the then Lord Aston, the father of her husband, and discharged the estate, as well as released the earl and the trustees from the same, but the earl took no assignment of the charge. He also, in part, paid the portion of his sister Mary, who was married to the late Lord Dormer; which portions he paid out of his own money.

By indenture of demise of 2d July, 1751, reciting the act of Parliament, and that the Earl had paid the portion of the said Lady Aston, and part of the portion of Lady Dormer, and that none of the said 15,000*l.* having been raised under the term of ninety-nine years, the said Earl was entitled to have such part of the same as he had advanced, paid and satisfied; and that Matthew Robinson (a party thereto) had contracted with the Earl, at the sum of 1000*l.*, for the purchase of a term of forty years in the advowson of the parish church of Bugfield, part of the premises comprised in the ninety-nine years' term, and that the executors of Lord Fitzwilliam (who had survived George Pitt, his co-trustee) had been applied to, to join in demising the said advowson, which they had consented to, on condition that the said 1000*l.* should go in part satisfaction of the 15,000*l.* to be raised by the said term: the Earl and trustees conveyed the right of patronage to the said Matthew Robinson for forty years. The Earl, after this deed, out of his own money, paid the remainder of Lady Dormer's portion, and also the portion of Lucy, his youngest sister; but took no assignment of their respective claims. The late Earl made his will, dated 12th June, 1747 (previous to several of these transactions), whereby, after ordering that such of his debts, for which no real security was given, should be paid out of his personal estate, and that those for which any real security was given, should be paid out of the real estates charged therewith, in ease and exoneration of his personal estate; and, after giving legacies and annuities, he gave all the rest and residue of his real and personal estate whatsoever and wheresoever, to his brother Charles Talbot, his heirs, executors, administrators, and assigns, and appointed him executor thereof. Charles Talbot died in the late Earl's lifetime. George, late Earl of Shrewsbury, died 21st July, 1787, without issue, and without revoking his said will, leaving the defendant Charles Talbot, now Earl of Shrewsbury (son of the said Charles Talbot), his nephew and heir-at-law, and plaintiff [*123] tiff, his widow, him surviving. *The plaintiff, 6th September, 1787, took out letters of administration with the will annexed, to the late Earl, and possessed herself of his personal estate, and filed her present bill, praying that the portions, paid by the late Earl, her husband, out of his personal estates, might be raised out of the ninety-nine years' term, for that purpose provided; and that all proper parties might join in raising the same; and that the same, when raised, might be paid to the plaintiff as widow and personal representative of the late Earl.

Mr. Solicitor-General, for the plaintiff. — Either tenant for life or tenant

in tail, who shows his intention to keep alive the charge, may do so. The rule of the Court is laid down in several cases, *Kirkham v. Smith*, 1 Vesey, 258; *Amesbury v. Brown*, 1 Vesey, 477.

Length of time, without calling for an assignment, certainly is a species of evidence that he meant to give up the charge.

Here, not having complied with the act of Parliament, within six months after attaining eighteen, Lord Shrewsbury was like a tenant for life, and his acts are to be reasoned upon in the same manner. His acts, with respect to the 1000*l.*, are sufficient to show he meant to keep the charge alive; the deed reciting that he was entitled to the money. And, although a long time has elapsed, it cannot be imputed to him, as he was obliged to keep down the interest.

Mr. Mansfield, Mr. Lloyd, and Mr. Graham, for the defendant. There is no ground to call upon Lord Shrewsbury's real estate to pay off this charge; as there does not appear to have been any intention in the late Earl to keep it alive. The question is, whether the late Earl was tenant in tail, or tenant for life only. Although, by the act of Parliament, he could not alien the estate; he was, to all other purposes, tenant in tail; as such, he might cut timber and open mines; and, although he was bound to keep down the interest of the charge, it appears, from *Amesbury v. Brown*, that, if he takes it in, he may entitle himself as a creditor. His interest, in this case, was larger than that of a mere tenant for life; for, if he had made a feoffment, or been vouched, it would have been no forfeiture, *Willion v. Berkley*, Plowd. 124. It is a common position, that, where a tenant in *tail pays off an incumbrance, it shall be [*124] a discharge of the estate, but where tenant for life does so, it shall not; but, although this has become a familiar rule, no reason has been anywhere given for it. It is allowed, on all hands, however, that very slight circumstances will show an intention that the payment shall be a discharge of the incumbrance on the estate. Then, supposing him tenant for life, *quoad hoc*; if he were so, the circumstances are sufficient to show he meant to pay the debt in discharge of the estate. He made a will, by which he gave the real and personal estate to his brother Charles, his heirs, executors, administrators, and assigns, under which it would have been indifferent, in which shape this property went. The present Earl is his son; and the late Earl, after the death of his brother, might not be aware that under the words, heirs, executors, administrators, and assigns, the property would not still pass. The estate was to go, free from incumbrances, to the persons to whom he would wish it to descend, those who would take the honors of his family. From this circumstance, it is probable he meant it should go exonerated of the charge. Then, upon his own acts, what appears to be his intention? In 1742, he paid the first portion, Barbara's, which is the only portion which affords any evidence of his intention upon the subject. He might, then, have taken an assignment of the charge or a personal receipt for the money; instead of that, he took a release to the estate charged: this shows he meant to discharge the estate. Then the deed of 1751 is very strong to the same purpose. The intent of that deed was, as he could not present in case of a vacancy, but the university would present, to do what those of his religion generally do, — to sell the next presentation. The person concerned thought the best way was by a term of forty years, and to make use of the term of ninety-nine years for that purpose; and the trustees very properly insisted, if they were to join, the money should go in discharge of their trust. It was not Lord Shrewsbury's intention to pay himself part of the money advanced, but the care of the trustees, which occasioned the recital. To show that it was not his de-

sire, a further sum was afterwards offered for an assignment of the whole term, which he refused; which proves he did not wish to have the charge paid off. And from 1741 to 1787, the time of his death, he shows no intent to reimburse himself the money advanced. Mr. Solicitor admits length of time will afford a presumption; then the question is, [*125] *what length of time. In this case, there was thirty years from the payment of the last portion, and forty-five from that of the first. In *Jones v. Morgan* (antea, vol. i. p. 206), seventeen years only had elapsed in the lifetime of the person who had paid the charge, and there was a circumstance, in that case, which operated to show he meant to keep the charge alive, as he had kept the original bond by him, uncanceled, all the time down to his death, yet your Lordship thought the length of time sufficient. In a case so doubtful as that, and where your Lordship thought that, upon the whole, he was tenant in tail, though the case was, in truth, that of *Bagshaw v. Spencer* (1 Ves. 142), it could not be conceived to turn upon matter of intention in the party. In the present case, there is no circumstance to show that the Earl meant it to continue a charge upon the estate. It stands entirely free from any circumstance of that kind. Owing to the mistake, with respect to the operation of the will, the widow possesses 50,000*l.* of his personal estate. This is, therefore, not a case in which the Court will wish her to take 14,000*l.* more, which the late Earl did not mean to go from his family.

LORD CHANCELLOR. I am clear that the takers of the estates (notwithstanding the clause) were tenants in tail; and, also, that where a term is outstanding in law, to raise a sum of money, and another person will pay that sum, *eo nomine*, that the person so paying has a right to stand in the place of the creditor.

If it is paid by the holder of the fee, the Court considers it as the debtor paying the debt, and therefore will not keep the term outstanding; but it will be a term to attend the inheritance, and he may make any use he pleases of it as such; but, as between his real and personal representative, it will, in the hands of the heir, be a payment of the debt by the debtor.

But the Court has gone further; for in the case of tenant in tail, where there are remainders beyond to other persons, it is not so distinctly the debtor's paying the money; but the Court has treated it in the same manner, because he is competent to make the estate a fee: therefore he is said to represent the fee. In that view, the Court consider the payment by the tenant in tail the same as if it was paid by the tenant in fee; (3) (a) and the term shall attend the inheritance: but if the [*126] tenant in tail gives *a demonstration that he intended the term to be burdened with the debt, it shall remain charged; but it requires proof, on his part, to show that term is outstanding. (4) (a)

Where a tenant for life pays a debt charged on the inheritance which he cannot make his own, (5) he stands in the place of the creditor: (b) but, from considering the circumstances in which the estates are limited, a presumption may be raised, that though he paid off a charge upon an estate, which he had for life only, circumstances may be laid before the Court, to show that he meant to discharge the estate. (c) Therefore, from

(3) See *Jones v. Morgan*, antea, 1 vol. 206, and the Editor's note.

(4) See the Editor's note, 1 vol. 206.

(5) See *Ware v. Polhill*, 11 Ves. 257, 274, 275, &c.

(a) 1 Story, Eq. Jur. ch. 8, § 486; *Jones v. Morgan*, 1 Bro. C. C. 206, and notes.

(b) See 1 Story, Eq. Jur. ch. 8, § 486, § 487, § 488.

(c) 1 Story, Eq. Jur. ch. 8, § 486, and cases cited in note.

the situation of the estate, it shall be presumed, that he meant to pay the debt, or not.

Taking this as the rule, the act of Parliament has settled these estates in inheritance unbarable. (6) Every taker has, under it, an estate of inheritance; but the act contains a prohibition of alienation. (6) With respect to the interest, it might be a question, whether it would not be contrary to the faith under which he holds it, for any taker to suffer a charge to remain on the estate.

The rule laid down applies to the case at bar, as strongly as to any estate for life. (7)

The person for whom the charge is to be raised, has no remedy for the interest against the estate; but if the personal estate of the tenant in tail was sufficient, the Court would make it pay; because it was a fraud not to keep it down. A tenant in tail, holding under the restrictions in the act, could not alienate by enlarging the estate. The estate of the tenant in tail (as of tenant for life) must, therefore, keep down the charge.

Then, as he could, by no means, make the estate his own, it makes it equal to him, as if it was an estate for life. (7) By paying the charge, he pays a debt upon a fund which he cannot make his own.

Then the question is, whether there are circumstances, in this case, to show that he meant the estate to be discharged.

*I lay it down, that it belongs to those who would exonerate the [*127] estate to show that it was to be exonerated.

Then, 1742, he pays off 5000*l.*, the fortune of the sister married into the family of Aston, and takes a release from her to show, that she did not take the money *aliunde*. It is a discharge, against her, to Lord Shrewsbury and the trustees.

But it is discharged by the payment of Lord Shrewsbury. Nobody has contended it would be impossible for Lord Shrewsbury to claim it.

Accordingly, in 1751, another transaction takes place, which would, otherwise, have been a fraud upon the estate. It was understood, by the parties to that transaction, that the sum paid by Lord Shrewsbury, was a sum in which the estate was indebted to Lord Shrewsbury. Then, Lord Shrewsbury, as tenant for life, meant to sell the advowson for forty years (if his three sons should so long live), to secure a presentation; and, that it might not be determinable on the death of Lord Shrewsbury, it was done out of the term of ninety-nine years in trustees, which did not depend on the life of Lord Shrewsbury. The trustees insisted that the money paid, should be so upon the recital that the whole was due to Lord Shrewsbury. This is a proof that he did not consider the estate as exonerated. There is no kind of presumption, arising from this transaction, that he meant to pay the charge to the parties; it was considered he might do what he pleased with the money. Then it is said, that the length of time which has elapsed, shows that he meant to discharge the estate: and it is assimilated to a waiver of a right. Where a man out of possession acquiesces, and the acquiescence is accompanied with circumstances not otherwise to be accounted for, but by presuming such an intention, it must be presumed; but here the intention only was that money which would bear 5 per cent. interest should be paid off. It seems to be the case of money paid by a person not liable to pay it, in discharge of the estate; unless there is proof that he meant to discharge it. For

(6) Vide etiam, the Duke of Marlborough's case, 3 Madd. 496.

(7) See also per Lord Eldon C. 11 Ves. 275.

nine years, it appears, he did not mean to discharge it; and, since that time, it stood doubtful what his intentions were. The money must, therefore, be raised, as prayed by the bill.

[*128] *This cause was reheard, at Lincoln's-Inn-Hall, the 19th July, 1790, (8) when Mr. *Solicitor-General*, and Mr. *Mitford*, were heard for the plaintiff; Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Graham*, for the defendant; but nothing material was added to the former argument; (8) and, Lord Chancellor continuing of the same opinion, both on the general principle and the particular circumstances of the case,

The decree was affirmed

(8) See, however, the report in 1 Ves. jun. 227.

HUTCHESON v. HAMMOND.

In Court, Hilary Term; reheard Lincoln's-Inn-Hall, 19th, 30th July, 1790.

(Reg. Lib. 1789. A. fol. 464.)

F. W., having an estate which came to her *ex parte materna*, on her marriage conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs; by will, she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life; then (after the deduction of 3500*l.* to uses which vested in the plaintiff A. J., and after payment of 1000*l.* to G. P.) to pay the residue of the purchase-money to the three defendants H. By codicil she gave the plaintiff, her husband, a power of appointing the 3500*l.*, in case A. J. should marry without his consent. G. P. died, living the testatrix, before the codicil made, but F. W. in the codicil, took no notice thereof. 1st. The 1000*l.* is real, not personal, and shall not go to the executors of G. P. (though given to her executors), nor to the personal representative of the testatrix, nor yet to the residuary legatee of the purchase-money, but to the heir-at-law, *ex parte materna*, the side from which the estate came. 2d. The 3500*l.* is vested in A. J., and the trustees having laid out a larger sum by 17*l.* with intent to appropriate it, it is well appropriated; (†) and Ann Jones having married once, with her father's consent, his power is gone; and he consenting to give up his life-interest, it was directed to be paid to the trustees in her marriage settlement.

By indentures of lease and release: the release tripartite, dated 9th of August, 1777, and made between Frances Hutcheson (then Frances Weeks) of the 1st part; plaintiff William Hutcheson of the 2d part; and Peter Hammond, Esq., one of the defendants, and Isaac Baugh, deceased, of the 3d part; certain lands, &c., situate in the parishes of Chew Magna and Dundry, or one of them, in com' Somerset (which descended on the said Frances Weeks *ex parte maternâ*), were conveyed to the said Peter Hammond and Isaac Baugh, their heirs, &c. to the uses following; viz. to the use of the said Frances Weeks (afterwards Hutcheson), till the then intended marriage; and, after the marriage, in trust for and during the natural life of the said Frances Weeks (afterwards Frances Hutcheson), to pay unto, or permit her to receive, the rents, &c. to her sole or separate use; and from and after her decease to the use of such persons, &c. as she should, from time to time, notwithstanding her coverture, and whether sole or married, by any writing or writings under hand and seal, dated in the presence of, and attested by, two or more credible witnesses, or by her last will and testament, or by any writing purporting to be her last will and testament, to be by her duly signed, sealed, and

[*129] executed, in the presence of *three or more credible witnesses, should direct, limit, or appoint; and in default of such limitation,

(†) See *Green v. Pigot*, 1 vol. 103, and the Editor's notes.

&c., to the only proper use of the right heirs of the said Frances Weeks forever.

The marriage took effect between the plaintiff William Hutcheson and Frances Weeks; Frances Hutcheson, by virtue of the power so given to her, and of all other powers and authorities in her being, by her last will and testament, and appointment in writing, dated the 19th of October, 1778, executed by her, and attested by three witnesses, did direct, limit, and appoint, unto the said Peter Hammond and Isaac Baugh, all her messuages, &c. as aforesaid; to hold the same to the trustees, their heirs, &c. in trust, after her decease, to sell the same; and, after deducting 100*l*. each for themselves, to lay out, and invest the rest and residue of the money to arise by the sale, in the funds, and permit the interest to be received by plaintiff William Hutcheson, her husband, during his natural life; and after his decease, to pay and dispose the principal money as follows: viz. to pay to the plaintiff Ann Jones (therein called Ann Hutcheson), and Walter Hutcheson, since deceased, the two youngest children of William Hutcheson, the sum of 1500*l*. a piece; but if either of them should happen to die before his or her said legacy should become payable, then, in trust to pay the legacy of 1500*l*. of him or her so dying, to the survivor of them, his or her executors, administrators, and assigns; and to pay 500*l*., other part of the said principal money, to her cousin Elizabeth Parker, spinster, if living, at testatrix's husband's death; and if not then living (which was the case), to pay said 500*l*. to plaintiff Ann Jones, her executors, &c.; and to pay 1000*l*., other part of the said principal money, to Mrs. Grace Parker of Healing, com' Surrey, spinster (who died in the testatrix's lifetime), her executors, &c.; and in trust to pay all the residue of said principal money, together with the interest or dividends which might be due thereon, unto the three youngest sons of Mr. William Hammond, late of London, Turkey merchant, to be equally divided between them, share and share alike; but if any, or either of them should happen to die, then to the survivors or survivor of them; and if all should die before the same be payable, then to said Peter Hammond, his executors, &c.; and, after giving some trinkets and wearing apparel, and also giving directions as to her burial, she nominated and appointed her said husband, the plaintiff William *Hutcheson, ex-[*130] ecutor and residuary legatee of her personal estate, over which she had any disposing power.

Walter Hutcheson, one of the legatees, died in the lifetime of the testatrix; and, after his decease, she by virtue of the aforesaid and all other powers in her being, duly made and published a codicil to her said will, dated the 13th of June, 1783; and, after reciting that the said Walter Hutcheson was dead, whereby plaintiff Ann Jones would become entitled to the said several sums, of 1500*l*. each, and also to the sum of 500*l*., in case of the death of the said Elizabeth Parker, before the decease of plaintiff William Hutcheson (and which hath since happened); the testatrix willed, that if plaintiff Ann Jones should, in the lifetime of plaintiff William Hutcheson, intermarry without the consent of plaintiff William Hutcheson, in writing under his hand first obtained, her trustees should pay and apply the said two several sums of 1500*l*. each, and also the said sum of 500*l*. in case of the death of said Elizabeth Parker, unto such persons, &c., as said William Hutcheson should by his will appoint; and in all other respects she thereby confirmed her said will. At the time of making this codicil Grace Parker was dead, as well as Walter Hutcheson, and was known by the testatrix so to be.

Frances Hutcheson died the 17th of November, 1783, without revoking or altering her said will and codicil, leaving plaintiffs, William Hutcheson and Ann Jones, her surviving. Elizabeth Parker is since dead, in the lifetime of William Hutcheson: and Walter Hutcheson, and Elizabeth Parker, being both dead, Ann Jones became entitled (subject to the life-estate of plaintiff, William Hutcheson) to the sums of 1500*l.*, 1500*l.*, and 500*l.*

After the death of the testatrix, the trustees sold the estate for 6500*l.*, and conveyed the same to the purchaser the 22d of October, 1784, and having paid all costs, &c. and retained 100*l.* each, given to themselves by said will, there remained in their hands the sum of 6252*l.* 6*s.* 2*d.*, being the residue of the money arising from the sale.

The trustees invested 2695*l.* in the purchase of 4500*l.* 3 per cents., but kept back 3500*l.*, to be invested to answer the amount of the legacies given to plaintiff, Ann Jones (subject to the life of plaintiff, William Hutcheson), in case the trustees be justified in so doing.

[*131] *The plaintiff, William Hutcheson, made several applications to Peter Hammond, the acting trustee, to lay out the sum of 3500*l.* in the funds, and several letters passed on the subject; the result of which was, that the trustees were desirous that the money should be laid out, and appropriated to the purpose of answering the legacies; and accordingly that sum, with 17*l.* 10*s.* (in order to make the stock purchased an equal sum), was laid out, by the broker of the trustees, in the purchase of 6400*l.* 3 per cents., of which notice was given by Hammond to plaintiff Hutcheson, in a letter of November 5, 1784; but no declaration of trust was made by the trustees, Hammond advising the father not to put himself to that expense.

The plaintiffs, Philip Jones and Ann his wife (then Ann Hutcheson, the before-named Ann Jones), intermarried together, with the consent of plaintiff, William Hutcheson, her father, in writing under his hand for that purpose first obtained; and, by indenture, the 3d of April, 1787, previous to the marriage, it was agreed, their proportionable share of the stock should be conveyed to the father, and other trustees, to the uses of the marriage.

The bill prayed that it might be declared, that the trustees, under the marriage settlement of Philip and Ann Jones, were entitled to the 3 per cent. annuities, purchased with the 3500*l.* upon the trusts of the settlement; and that the stock might be transferred to them accordingly; and that the plaintiff William might be declared entitled to the sum of 1000*l.*, intended for Grace Parker, and that the same might be paid to him.

Several questions arose.

First. As to the 1000*l.* legacy charged on the land for Grace Parker.

1st. Whether it resulted as land unsold; and, if it did, whether it was to go to the heir *ex parte paternâ*, or *ex parte maternâ*.

2dly. If not, but it was to be considered as money, whether it should go to the plaintiff, the husband, as executor and residuary legatée of the general residue.

[*132] *or, 3dly. Whether it should go to the children of William Hammond, under the gift to them of all the money arising from the estate, not before disposed of.

Second. As to the 3500*l.*

1st. Whether what had been done amounted to an appropriation.

2dly. Whether, if it had, such appropriation could be made without the

consent of the persons who might ultimately become entitled, on the contingency of its becoming forfeited by a marriage without consent, and no appointment made by the plaintiff, William Hutcheson, pursuant to the power in the codicil.

This last question introduced another, not foreseen by the counsel, nor spoken to, though the judgment of the Court partly turned upon it, viz. whether the condition in the codicil was a good cause of forfeiture, in the event that had happened, of plaintiff Ann having married with the consent of the father, in case she should, on the death of her present husband, marry *again*, in the lifetime of her father, without his consent.

Mr. *Solicitor-General*, Mr. *Lloyd*, and Mr. *Pemberton*, for the plaintiffs. The legacy of 1000*l.* is lapsed, and, if so, according to the intention of the testatrix, it goes to the plaintiff William Hutcheson, as residuary legatee. The mere circumstance of the additional words, "her executors, administrators, and assigns," will not be sufficient to transmit the legacy to the personal representative of the legatee, dying in the lifetime of the testatrix; it was so held in *Maybank v. Brooks* (ante, vol. i. p. 84): but, it is said, here is an additional circumstance arising from the silence of the testatrix, who, in the codicil, makes a disposition of a legacy which she had given to another deceased legatee, but takes no notice of Grace Parker, though she knew of her death; which imports, that she meant the words, "executors and administrators," should have their due operation: but that is impossible, because it would be straining the intention too far; and that circumstance is favorable to the residuary legatee. The testatrix must have considered, that the property arising from the real estate would pass to her husband as the residuary legatee. The principle of this Court is, that where money arises from the sale of land directed to be sold, it has never been held personalty, unless directed by the testatrix to be disposed of as *such; it is apparent, on the whole of the will, that [*133] the word *money* is absolutely meant to include money arising from the sale of the real estate. There are many such cases; and, in the present case, there are numerous circumstances to induce the Court to believe, that the testatrix meant everything she could dispose of should go to her husband as her residuary legatee; as in *Durour v. Motteux*, 1 Ves. 320; *Mallabar v. Mallabar*, Forrest. 78. She had no power but on this estate, which she ordered to be sold; this, and the making the husband residuary legatee, are strong circumstances: her directing it to be turned into personalty, and, by a subsequent codicil, confirming the will, and appointing her husband executor and residuary legatee of her personal estate, over which she had any disposing power, are much to be relied upon. 2. With respect to the question of appropriation, the plaintiffs, the father and daughter, are entitled to the appropriated sum. It was a vested interest in them at the death of the testatrix, subject to no contingency. But whether absolute or contingent, if the fund was clear of debts, the appropriation was right, by the rules of the Court. The testatrix meant the fund should be productive to the parties entitled under the will: it was directed to be laid out as soon as the estate was sold: application was made for that purpose, and an agreement that it should be laid out; the parties, are, therefore, bound, whether there be a fall or rise of stock. The letters are all to that purpose: had there been an instrument executed, whereby the parties had declared that whether this should be an appropriation or not, should depend on the opinion of the Court, still it would have been an appropriation. In the case of a legacy given to an infant, where the executor is satisfied that the fund is clear of debts, he may in-

vest it in the funds; and having done so, and put it out of his own power, should money be lost by the failure of the funds, the party intrusted cannot charge the executor, he having done no more than the Court would have ordered if a bill had been filed. The residuary legatees had nothing to do with it; the Court will appropriate, where they are not parties to the suit, *Green v. Pigott* (ante, vol. i. p. 103). The parties here were certainly in a situation to call for an appropriation; and the question is, whether an absolute one was made, or there was only a treaty for it; had a bill been filed, the Court undoubtedly would have done it; whether the interest of the parties were absolute or contingent, the Court would have impounded the property.

[*134] *Mr. Mansfield, and Mr. Stainsby, for the defendants, the Hammonds, the legatees of the particular residue.

This will is an execution of a power by which the testatrix is said to have appropriated this 1000*l.* to Grace Parker, her executors, administrators, and assigns, and then added a codicil, by which she confirmed her will. Mr. Hutcheson claims within the terms of that appointment, as executor of Grace Parker. In *Maybank v. Brooks*, it was held otherwise, as to the interest of the particular legatee. It seems to have been the intent of the testatrix, to give the whole of the money arising from the sale, and undisposed of, to the residuary legatee of that fund. Questions have arisen, in such cases, between the heir-at-law and the residuary legatee, where particular legatees have died, as in *Ackroyd v. Smithson* (ante, vol. i. p. 503, 2d edit.). In such cases the next of kin has claimed it as money; but the heir has always said, at the death of the testator it was real, and must continue so; and if money has been raised by the sale, it must result to the heir-at-law. *Dorour v. Motteux*, 1 Vesey, 820, was a gift of the residue of such money as should arise from the sale of real estate, and the same thing, in fact, as the gift of money, and the residuary legatee took the whole. There is no case in favor of the heir-at-law, where it has been held to result. Here the legatee was dead previous to the testatrix making the codicil; and her saying, in that codicil, that she confirms her will, amounts to a republication. So in *Gibson v. Lord Mountford*, 1 Vesey, 493. Upon the effect of this codicil, the three Hammonds are clearly entitled to the residue. 2. With respect to the appropriation, the question is, whether any appropriation has been really made. From the language of the letter, there is no reason to think it an appropriation. There are two modes of making an appropriation; the trustee may secure it by a declaration of trust, or the 3500*l.* might have been transferred to the trustees in Mrs. Jones's marriage settlement. No such thing has been done; on the contrary, the letters say, nothing can be done but by an application to a court of equity; in fact, an appropriation without the approbation of this Court is no appropriation. In *D. of Montague v. Lord Godolphin*, 2 Vesey, 61; *Burnet v. Holgrove* [Eq. Ca. Ab. 296^t]; *Hurst v. Lord Winchelsea*, 2 Bur. 879, and Lord *Montague's* case, Cane. 1755, Lord Hardwicke considered an appointment under a power, to operate, not as a will, but merely as a power; so in [*135] *this case, we claim under the appointment as nominees by way of substitution.

Mr. Mitford, and Mr. Richards, for the other defendants.

There are three points: 1st. Whether the plaintiffs have a right to an appropriation. 2d. Whether an appropriation has been actually made. 3d.

With respect to the 1000*l.*, to whom it now belongs. It is claimed by three parties : 1st, by the plaintiff, insisting that he takes it under the disposition made by the wife : 2dly, by the representative of Grace Parker : 3dly, by the heirs *ex parte paternâ* and *maternâ* of the testatrix. The position laid down for the plaintiffs cannot be taken as true, to the extent to which it is laid down. It must be allowed, that where a testator leaves several legacies, some to one and some to another, and then gives a residue of his personalty, the Court has two motives, one for the safety of the legatees, the other for the purpose of ascertaining the residuary fund. If a legatee comes into court and says, though my legacy is not payable immediately, I have yet a right to have it secured ; the Court has, of late years, appropriated the legacy ; but Lord Hardwicke doubted whether a contingent legacy could be so secured : 1 Atk. 505 ; 3 Atk. 101 ; both which cases are cited in *Green v. Pigott*. Of late times, whether a legacy is payable at a certain time, or contingent, the Court will secure it ; but it has never done so where the whole is given to A. for life, and after the death of A. to several, without the consent of the residuary legatee ; for that would be a deviation from the will. Here, as the parties were infants, there could be no such consent. There is no case where the Court has said, that the person entitled to the principal, after the death of A., shall have a right so to apply as to take the chance of the stocks : for such a right must be mutual. Nothing done by the trustee can prejudice the right of the *cestui que trust* : the trustees saying they would lay out the money, can have no effect. As to the 1000*l.*, Mr. Hutcheson's claim has no foundation ; it could not pass as personalty. *Durour v. Motteux*, and *Mallabar v. Mallabar*, were decided on the ground of the real and personal estate being blended so as to make one fund ; and as the party could take nothing but personal estate, the heir could have nothing to take. In *Mallabar v. Mallabar*, by the words "personal estate," the money to arise from the real estate was intended to pass, as appeared from the words of the will. The 1000*l.* undisposed of falls into the residue, as being undisposed of ; the will and codicil may be considered as two instruments referring to each other. *Potter v. Potter*, 1 Vesey, 437, and [*136] *Jackson v. Hurlock* (ante, vol. i. p. 61, note, 2d edit.), were cases of republication. The only doubt has been, whether a codicil, of personalty merely, should affect a will of realty, so as to operate as a republication : which doubt has, by both those authorities, been removed, and the distinction overruled. Every residue of this kind is a residue of all that is not *effectually* given.

Mr. *Graham*, for the heir *ex parte maternâ*.

The 1000*l.* being lapsed, by the death of the legatee in the life of the testator, is part of the old reversion. A limitation to the right heirs of the settlor is always considered as part of the old estate : a lease and release passing nothing but what is expressed ; not like a fine, which operates by transmutation of estates. It is agreed that the real estate might be blended with the personal, and, agreeably to the cases of mixed funds, might pass by the will ; and for this purpose *Mallabar v. Mallabar* is cited. There is no doubt, that, in that case, it was considered as a mixed fund. It was a devise to sell, and the residue given to the sister, by a sweeping clause, by which the testator meant that all that should drop should go to the sister. In that case, evidence, also, was read, which determined Lord Talbot's mind on the subject. In *Motteux v. Motteux* (*Durour v. Motteux*), 1 Ver. 320, there were circumstances to show it was intended as a mixed fund, and that there was an intention to dispose of the realty as per-

sonalty. We come now to cases which decide the point, that where money is to be raised out of a real fund, and the legacies fail by the death of legatees in the lifetime of the testator, the residue is a specific residue, and does not comprise the lapsed legacies, *Cruse v. Barley*, 3 Wms. 20, and the cases cited by Mr. Cox, in his note, of *Digby v. Legard*, and *Ackroyd v. Smithson* (also reported ante, vol. i. p. 503), in which Lord Chancellor approved of the case of *Digby v. Legard*. In *Hewit v. Wright*, Dorothy's share lapsed, and, as such, became part of the residue. It was held that it was converted; and being undisposed of, as personal estate, was comprised in the residuary clause. Here the codicil gives operation to the will. It is impossible to contend, where a codicil is made for a particular purpose, that, if it refers to the will, it will not republish the will, *Acherly v. Vernon*, 1 *Williams, 783, but there must be words in the will to pass the lapsed interest. The question is, whether, by the confirmation of the will, in the codicil, the residue, containing the 1000*l.*, passed. In Doe on the demise of *Norris v. Cubit*, Douglas, 31, there were words sufficient to pass the interest. *Potter v. Potter*, 1 Ver. 437, had also sufficient words to pass the intermediate interest. All these cases are where the words were sufficient. Then the question is, whether there are sufficient words in this will, to speak in the year 1783. There must be express words to disinherit an heir-at-law, or a necessary implication that the estate must pass. But there is nothing, here, to alter the original devise, if the words "rest and residue," in the original will, were not sufficient to pass the 1000*l.* The words are, to pay 500*l.* to Ann Parker, if living, if not to Ann Hutcheson; and to pay 1000*l.* to Grace Parker, her executors, administrators, and assigns; to pay the rest and residue to the three sons of Hammond. It cannot be contended that the 1000*l.* comes within the gift to the executors, administrators, and assigns of Grace Parker. In *Maybank v. Brooks* (ante, vol. i. p. 84), the legacy was held not to pass to the executors, &c., although the testator knew, at the time of making the will, that the legatee was dead. The testatrix thought here, either that the executors would take, or that it was good as an appointment; and, by the codicil, confirms the will in all other respects: she could not, therefore mean the residuary legatee to take the residue, including the 1000*l.*, but meant to refer to the will, as it stood, in which the legacy was given to Grace Parker, her executors, administrators, and assigns.

Mr. *Simeon*, on the part of the heir *ex parte paternâ*, contended, 1st. That this was not money, but land unsold. All the cases prove this proposition, that, where land is to be sold for a special purpose, which cannot be carried into execution, it shall be considered as land; that, even if converted, it is still land, in a court of equity. The question always is, whether you can collect, from the circumstances, that the testator meant to convert his real estate into personalty. If he did, it must be disposed of, either by the particular legacy, or, by the residuary clause. This was the ground of decision in *Mallabar v. Mallabar*, and *Durour v. Motteux*: there it was intended to be a mixed fund, and the real and personal funds were blended. The distinction attempted between the case, where [*138] the question was *between the heir and residuary legatee, upon the lapse of a particular legacy; or where it was between the heir and next of kin, upon the lapse of such a legacy, where no residue was given; or upon the lapse of a residue or part of it, when the question would still be between the heir and next of kin; could not be supported. *Cruse v. Barley*, and *Ackroyd v. Smithson*, were cases between the residuary legatee and the heir, upon the lapse of a particular legacy charged on

land; and it was decided to be a resulting trust for the heir. And in *Ackroyd v. Smithson*, Lord Thurlow applied the rule laid down in *Digby v. Legard*, where the case was decided as between the next of kin and heir; which shows the distinction is of no avail; but that, in both cases, the only question is, the intention to convert, and that (in case there is no intention *absolutely* to convert) the heir shall take. In *Robinson v. Taylor* (ante, vol. ii. p. 389), *Ackroyd v. Smithson* has been confirmed and approved. The codicil makes no difference in the question; for though it confirms the will, and thereby deduces the date of the will to that of the codicil, it does not necessarily pass the real estate; it only gives a capacity to the will to pass it, if the testatrix intended to pass it. The doubt raised, into which residue it should fall, shows that no intention could be clearly found. As to the intention to pass the 1000*l.* which remained land unsold, without any indication in the codicil that it was to become personalty, it could not fall into the *general* residue, nor could it fall into the particular residue, which was to consist of money to arise by the sale, after the 1000*l.* was paid out of it. The circumstance of giving, by the codicil, the 1500*l.* and 500*l.* legacies, which had lapsed, and being silent as to the 1000*l.* which the testatrix knew was, also, lapsed, showed she meant, either not to dispose of it, but let it result, or that she had forgotten it, which, on a question of intention to give, must have the same effect. It frequently happens, a person may die intestate, as to part, though a general residue is given, in cases of pure personalty, as appears by *Dawers v. Dewes*, 3 Wms. 40; *Cook v. Oakley*, 1 Wms. 302. Upon devises of land, a lapsed devise will not fall into the residue, but result to the heir: and the money, here, being to be considered as land, must be taken as a devise of the land itself; and must go to the heir; who is never to be disinherited by implication.

2dly. Considering the 1000*l.* as land; the heir, under the deed, is to take as a purchaser; and then the heir *ex parte paternā* *must [*139] take. It is not a resulting trust, but an express disposition. A disposition by lease and release, operates by transmutation of possession. It puts the interest out of the grantee. Here, she reserved a power of disposal; but, in default thereof, it was to go to her right heirs, not to herself and her heirs; if so, it would have been to the old use; but the use being put out of herself, her right heir was to take by purchase; and then that heir must be the heir *ex parte paternā*. In Comyn's Digest, the cases are strung together. Where a man seised in fee, puts the fee out of himself, and declares no new use, it shall be to the old use: but, if tenant in tail suffers a recovery without any use declared, it operates to give him a new estate in fee, and, however he held before, would make a *descent ex parte paternā*. The trustees, in this case, must convey to the heir; for that purpose, they must have the whole fee. Here is a springing use, to take effect, at the settlor's death, to her right heirs. But it is said, that a person cannot make his right heir a purchaser; this is true by will, but not by deed; and where the grantor puts the whole estate out of himself, the heir must take by purchase. In *Hurst v. Morgan*, which went from this Court to the King's Bench, and is mentioned in Sir James Burrows's Reports as 2d May, 1755; a feme covert, on her marriage, conveyed, by lease and release, to trustees in fee, to the use of herself for life, with power to appoint, &c. in default, to her right heirs. This was held a limitation to the heir by purchase, and that the descent was broken. In the cases of money to be laid out in land, and settled to uses, with the ultimate remainder in fee to the right heir of

the devisor, the conveyance must be made to the heir as a purchaser. I took that distinction in *Lady Thoredale v. Lord Coventry* (ante, vol. i. p. 240), and it was admitted by Mr. Kenyon, Attorney-General, who said, it had been decided by Lord Henley, in *Robinson v. Knight*, (which he cited from Mr. Ambler's note), (1) if the conveyance was to be made to the heir as a purchaser, or an use would spring in him, to make him take by purchase, the operation of the legal estate would not be prevented, by any consideration from whence the equitable estate came; but the estate would go beneficially to the heir, to whom it came for his own use, and not as a trustee for the use of the heir *ex parte maternâ*. By *Alston v. Wells*, Douglas, 771, there is no equity between the paternal and maternal heir, *Balch v. Putt*, Trin. 8 Geo. 3, [*140] cited there. *This doctrine is recognized in *Waile v. Paget* (ante, vol. i. p. 363), where it is held that the legal estate shall direct the descent.

Mr. *Mansfield*, in reply, for the residuary legatees of the money to arise from the sale.

1st. If this question was to rest solely on the will, the 1000*l.* must belong to the three Hammonds (the specific residuary legatees); because, where money, as money, is given to particular legatees, and the rest to residuary legatees, and a part of the money lapses by death, the residuary legatees will take that increase. In *Cook v. Oakley*, it was clear the testator did not mean to dispose of the leasehold estate. In *Cruse v. Barley*, so far from the contrary being determined, that which I contend for was laid down as a clear point. The question was, as to the 200*l.* given to Christopher, which never vested. If Christopher had been dead at the time of making the will, it would have fallen into the residue. The difference is plain: where it lapses in the life of the testator, he is supposed to know it; and whatsoever lapses goes to the residuary legatee. No answer is given to the case of *Durour v. Motteuz*. *Digby v. Legard* was a gift of a residue: the testator was considered as dying intestate as to the lapsed share; *Ackroyd v. Smithson* is an instance of a lapsed legacy. *Wright v. Hewit* does not impeach the doctrine. With respect to the codicil, it is determined it will republish the will, *Acherley v. Vernon*. But, it is said, that it will not operate without specific words to dispose of the lapsed property. I take the effect of it to be, that, if there be any words in the will to dispose of the residue, the codicil will carry the lapsed interests. *Gibson v. Lord Montfort*, 1 Vesey, 485; *Potter v. Potter*, 1 Vesey, 437; and that is just the same as if the will was written over again. On this principle it is, that after-purchased lands will pass. It is the same as if the will was copied, with the omission of the 1000*l.*

Mr. *Solicitor-General*, in reply, for plaintiff, the general residuary legatee.

It will be difficult for me to contend, what I must contend, that this is to slip through the first residue, and fall into the second. If [*141] the 1000*l.* lapsed under the will, and the codicil *was held to republish it; it might be contended, that the words would operate as a confirmation of the will. The questions in the cause, I suppose, are,

1st. Whether the plaintiffs are entitled to the last alternative in the prayer of the bill: that, if no appropriation has been hitherto made of the 3500*l.*, the father giving his consent, the sum may be now paid. It

(1) Since reported from Lord Northington's MSS. by Mr. Eden, 2 vol. 155.

is said her 3500*l.* cannot now be appropriated. Mr. Mitford says, that great mischief would arise if the trustees could appropriate, when the funds are low, against the residuary legatee: but the Court does not consider the funds as varying in value; and the decision must be the same respecting stock, or where money is in the bank, or upon mortgage. He says the tenant for life is to have the interest for life; and the other parties to have liberty to apply upon his death: but the Court will order the money to be laid out earlier, upon the consent of the tenant for life, *Green v. Pigott* (ante, vol. i. p. 108); *Gawler v. Standewicke*, where it was determined, that, if a personal fund be provided, the Court will secure it, but will not raise it out of land. The case of *Phipps v. Amesley*, 2 Atk. 57, was there recognized; but where it is personal estate, the Court will appropriate: it will secure the fund, whether the legacy be vested or contingent. In *Cooper v. Douglas* (ante, vol. ii. p. 281), the Court said, it was no appropriation, because the executrix was to have an advantage in it; but here Miss Hutcheson might have come and had an appropriation during the life of the father. The case of *Green v. Pigott*, and the ordinary course of the Court, prove this.

The 2d question is, Whether the trustees could appropriate, without the consent of the Court. In *Trafford v. Boehm*, 3 Atk. 440, it is laid down, that there is no necessity for a decree of the Court: that, though the parties may come here for the security of the trustees, it will be an appropriation, though not done by the Court. The will, in this case, had given this lady a legacy, in which she had a vested interest, subject to the father's life: by the codicil, a condition was annexed, of marrying with consent, with remainder over. The father could not bar himself of the right of appointment. If he appointed, there was a remainder over. If the father made no appointment, the 3500*l.* would fall into the residue. It has been held, that a mere devise *of a residue will [*142] not make the condition of marriage with consent effectual. In *Amos v. Horner*, 1 Eq. Abr. 112, it was held sufficient; but that has been denied to be law, *Paget v. Heywood*, cited 1 Atk. 378, and *Wheeler v. Bingham*, 1 Wilson, 135. Here the father is entitled to the interest for life; and, at his death, the daughter, having married with his consent, would take the principal, unless a second marriage, without consent, would bar her from so doing; but it could not be intended to extend the condition to a second marriage. With respect to the appropriation: the argument has confounded the right of appropriation with the right of payment. This is a sum of 3500*l.*, the interest payable to the father for life; the principal afterwards to the daughter; or, in a certain event, as the father should appoint. The residuary legatees have no claim. The legatees have a right to an appropriation. Here the parties interested called upon the trustees to appropriate, when the stocks were low, and the trustees directed the 3500*l.* to be laid out separately.

Mr. Graham, in reply, for the heir *ex parte maternâ*. I contend, upon principles, that this is the old reversion. The conveyance by lease and release operates only by virtue of the statute of uses. The estates of persons *in esse* only are executed. The fee remains in the feoffees, to serve the springing uses. All the cases show, that wherever, either by deed or will, the grantor gives a reversion to his own right heirs, they take by limitation, not by purchase. What would be the consequence of their being taken as words of purchase? That a limitation by the

wife to the husband for life, remainder to children, in such shares as they should appoint, with a remainder to her right heirs, would take the fee out of her during her life; whereas all the uses, not parted with, must remain in her.

Mr. Justice *Buller* (after stating the case):—

The question arises upon the legacy of 1000*l*. To this five claims are set up. The first is by the plaintiff, William Hutcheson, as executor of Grace Parker: for this there is no foundation. I agree with the counsel, that having, by the codicil, confirmed the will, it must be read as if dated on the day of the date of the codicil; but I am not at liberty to blot out any bequest contained in that will, and therefore it will stand as if, after the death of Grace Parker, she had given a legacy to her, her [*143] executors, and *assigns. The authority of *Maybank v. Brooks* (ante, vol. i. p. 84) is precisely in point. There is no foundation to say the executors were to take *eo nomine*. If there was any ground to say that, as Grace Parker was dead, it should be considered as a substitution of the executors, that was equally open in *Maybank v. Brooks*; but that case is decisive, that nothing went to the executor. (a)

2. The husband claims as residuary legatee of the personal estate. In this case, it is perfectly clear, that this 1000*l*. cannot be considered as part of her personal estate. The authorities are very distinguishable from the present case. In *Mallabar v. Mallabar*, and *Durour v. Motteux*, the two funds were blended together, and there was a general residue; not distinguishing, as here, between the residue of the real, and that of the personal estate: and it is apparent, that unless the Court had put the construction it did, that the words should carry the residue of both funds, the wills must have been totally avoided. These circumstances were strong, and conclusive, to show the intention of the testators; and where the intention of a testator is clear, it must be considered as part of the personal estate: but here, the intention is different; under the residue, she did not mean to comprehend any part of the money to arise out of the real estate; therefore, his claim must be rejected.

Then the question is, between the residuary legatees of the money arising from the sale of the real estate, and the heirs-at-law. In cases of this kind, some technical reasoning must be adduced. Supposing the intention not to be clear; in a doubtful case of construction, it should turn in favor of the heir-at-law. There seems to be no reason, originally, why the residuary legatees, in such cases should not take; but that the heir is favored in cases of land, and uses springing out of land. The decision, in most of the cases, is, I believe, against the intention of the testator; but it is established, as a rule, that there must be an apparent intent, upon the face of the will, in order that the residuary legatee should take the whole. That is the ground of the cases cited at the bar. Here is no apparent intention against the heir; therefore the general rule must take place, that the money is considered as land; and if by subsequent accidents, and the party interested in it dies, so that it lapses, it will belong to the heir-at-law. (b)

[*144] *The next question is, who is the heir-at-law entitled to take; the heir *ex parte paternâ*, or, *ex parte maternâ*. It is admitted, the

(a) See the cases cited in notes to *Maybank v. Brooks*, 1 Bro. C. C. 84. See also *Bridge v. Abbott*, post, 224; 2 Williams, Ex. Pt. 3, Bk. 3, ch. 2, § 5, p. 759-760.

(b) See *Ackroyd v. Smithson*, 1 Bro. C. C. 503, 514, 515, and notes and cases cited to this point; *Robinson v. Taylor*, 2 Bro. C. C. 589, 595, and notes; *Ram on Assets*, ch. 14, § 1, p. 203, 204.

estate came to Frances Weeks, by descent from her mother; and the question is, whether the settlement upon her marriage, by giving the ultimate remainder to her right heirs, gave them a new estate, as purchasers, or the old uses remain. I think it was the old use. Mr. Simeon has argued it upon different cases, as the case of a tenant in tail with remainder to himself in fee, suffering a recovery, that a new use will arise to himself in fee: this is true; but it should be remembered, that if tenant in fee suffer a recovery, the old use remains. If I was inclined, in this case, to decide in favor of the heir *ex parte paternā*, I must say she had put the estate out of her own power, in case she had survived her husband: but it is clearly otherwise; for it is expressly stipulated, that she should have the estate to her own use, and, notwithstanding her coverture, should have a power to dispose of it; and it is expressly limited to her own right heirs for ever; so that the estate was left in her hands, to remain to her own use, as if there had been no settlement. Two cases have been cited where the question was between the heir *ex parte paternā*, and *ex parte maternā*, where the person last seised had the equitable and legal estate; the Court held the legal to be the better estate, and that it absorbed the equitable; that, therefore, the estate must go in the line from whence it came. The case of *Balch v. Putt* does not apply; there the limitation was to the trustees and their heirs, to the use of them and the heirs, which took the legal estate out of the grantor. For the reasons given, the maternal heir will be entitled to the 1000*l.* subject to the life estate of the husband.

The next question relates to the 3500*l.* given to the plaintiff Ann Jones; and upon this several questions have arisen: 1st. Whether this sum could have been appropriated by the trustees, or the Court. 2dly. Whether it has been so appropriated. 3dly. Whether it can be now paid to the trustees under her marriage settlement. With respect to the first question; whether it can be appropriated; it is only necessary to go to the case of *Green v. Pigot* (ante, vol. i. p. 103): that case decides, that, even on contingent interests, any person interested may come and have the fund appropriated; and it is convenient, and indeed necessary, that it should be so; and in cases where the interest of the fund has been given to A., *and the principal, subject to that interest, divisible [*145] among several parties; upon the application of A. the Court has interfered. The question is, whether there are other rights affected by the approbation; where that is not the case, it has been frequently done: I did it last week, in the case of Lady Cavendish, and ordered the fund, of which she was entitled to the interest, to be paid to her son, she coming in and consenting. Then, if the Court would have appropriated the fund, the trustees are justified in doing it, without its intervention. The second question is, whether they have appropriated it. If the trustees are not decided in their opinion, they have a right to ask the opinion of the Court. In this case, the trustees have acted a fair and honorable part, to give every person interested every advantage they could. They certainly have not thought the residuary legatees the persons principally interested; if they had, I should not have approved their conduct. The particular legatees are the principal objects of the testator's bounty, and therefore not to be sacrificed to the interest of the residuary legatees, who are more remote in his intention. The trustees did not choose to do it, without the opinion of the Court; but the tenor of their letters is, that they are ready to do it if they can. They have made the appropriation; and by the letters and conduct, both of the father and daughter, it appears they have allowed

and approved of it. The father, in one of his letters, says, he will make it up a round sum, and that he is ready to take it at all risks. The trustees separated that sum, as a sum to pay the father and daughter the legacies. But let us see what could have been the intention of the parties. The sum to be laid out was 3500*l.*, but that could not be done exactly: the broker added, thereupon, 17*l.* more. Was it necessary the trustees should be exact? Clearly not, after the father had said, he would make it up a round sum. Then with respect to the declaration of trust, it appears a declaration of trust was prepared; but Mr. Hammond thought it unnecessary to put Mr. Hutcheson to that expense. It does not admit of a doubt, that the sum was laid out for the payment of the legacies; and the only condition intended was, if the Court should approve; if it did, it should operate as an appropriation. (c)

The question, therefore, is, whether stock should now be trans-
[*146]ferred to the trustees of Ann Jones's marriage settlement, *the father being entitled to the interest for his life. I have doubted more on this part of the case than the others. It was strongly pressed, by Mr. Mitford, that the father could not give up his power of reappointing, on the daughter's marrying during his life without consent. If any person is interested besides the father and daughter, I cannot order this sum to be transferred. I am clear the power cannot be released, Co. Lit. 265. b., Brownlow, 210. (d) But, if the condition is released, it should seem that the power is void. This depends upon the question whether the condition is satisfied by Ann Jones's first marriage with the consent of her father. The words of the codicil are very strong. There are cases where conditions of this kind are considered as odious; (2) and if this condition was extended beyond a first marriage, it might be attended with inconvenience; and I do not think it would fall within the original intention of this condition. The intention of these conditions is to prevent children from making inconsiderate engagements, they, therefore, do not extend to the case of a widow, or to a second marriage; and, therefore, the Court is warranted to say, the condition is complied with by the first marriage; that the legacy is vested, and the condition gone: consequently there is an end to the father's power, and nobody is now interested but the father and the daughter: and the case stands upon the same ground with that of Lady Cavendish, where the tenant for life agrees to give up the advantages of a sum of money for life, and consents to its being paid immediately to the person entitled to the principal. (c)

Decreed, therefore, that the 1000*l.* be paid to the heir *ex parte maternæ* and the 3500*l.* to the surviving trustee in Ann Jones's settlement.

The cause came on to be reheard before Lord Chancellor, 19th July, 1790, when Mr. Mitford, Mr. Richards, Mr. Mansfield, and Mr. Simmon, were again heard for their respective clients, and argued, to the same purpose as upon the former hearing; when Lord Chancellor gave a clear

(2) As to conditions in restraint of marriage, see *Hemmings v. Munkley*, ante, 1 vol. 303, &c.; *Scott v. Tyler*, 2 vol. 431, &c. and the Editor's notes, passim.

(c) See upon this subject of appropriation, *Green v. Pigot*, 1 Bro. C. C. 103; *Cooper v. Douglass*, 2 Bro. C. C. 231; *Sitwell v. Barnard*, 6 Ves. 543; *Atty. Genl. v. Manners*, 1 Price, 411; *Hill v. Atkinson*, 2 Meriv. 46; *Webber v. Webber*, 1 Sim. & Stu. 311, 312, 313; 2 *Williams*, Ex. Pt. 3, Bk. 3, ch. 4, § 4, p. 861-864.

(d) See the doubt of this suggested in *Sugden on Powers* (4th Eng. edit.), 50.

(e) The whole doctrine upon conditions in restraint of marriage, is collected in *Scott v. Tyler*, 2 Bro. C. C. 431, and the notes to it. See also *Sugden on Powers* (4th Am. edit.), 269.

and decisive opinion against the claim of the heir *ex parte paternâ* to the 1000*l*.

Upon Mr. Graham's arguing again, on the part of the heir *ex parte maternâ*,

*Lord CHANCELLOR said, the question was, whether the testatrix's direction, that the money to be raised by the sale of the estate should be laid out in the funds, was merely an arrangement to give the husband a life estate in the interest, or she meant to give the residuary legatee an eventual chance, to depend on the rise or fall of stocks; if this latter was her intention, it would be impossible to maintain the decree.

Mr. *Graham* then argued, that the former was her intention.

In this he was followed by Mr. *Solicitor-General*, who argued for the plaintiffs, and contended that it appeared by the words of the will and codicil, that her intention was that the land should be sold, and the money invested in the funds, merely for the purpose of the father's receiving the interest for his life; and then the money was to be disposed of in the manner directed by the will and codicil: that this was merely a mode of making a provision for the husband; and the effect afterwards was to be the same as if it had been to be paid immediately. With respect to the point of appropriation, he added to the cases formerly cited, one *Ex parte Champion* before Lord Northington, where a legacy being given to an infant, was laid out by the executors in 3 per cents., and the stocks afterwards falling, the infant was held to be bound; Lord Northington holding the trustee justified, because the Court, if applied to, would have made the same appropriation.

Lord CHANCELLOR. — None of the cases have been attended with the same circumstance with the present; that the land is to be sold, the money invested in the funds, to the use of one for life, then the funds to be sold, and the money to be divided; by which it might happen, that the residue would be very great or very small, or even that the legatees must abate: I think the direction to lay out the money in the funds was merely for the purpose of arrangement, and the rights of the parties were not intended to be affected by it. In order to say that they were to be affected, the testatrix must have foreseen the event, and have intended to give the residuary legatee a chance, what would be the event of the funds; if so, I agree it would be impossible for the father to do more than to give up his own chance, and he could not enable the daughter to make an immediate claim. On the other side, it is said, she meant only to make an arrangement. It is material to consider it with a view to the original transaction. Suppose her intention was to *give the residuary [*148] legatee a chance, what might be the value of the stock in the event, the Court could not order it to be divided till the death of the tenant for life; but I think the better construction is, that it was merely for the purpose of an arrangement; in which case, if the father would release his interest, either to his daughter or the residuary legatee, it would give an immediate interest, and consequently there might be an appropriation. Then, the appropriation was made conditionally to abide the inquiry whether it could be made: I am inclined to think the appropriation could be made; and, if so, it is made. Having said nothing as to the disposal of the 1000*l*., the heir is not defeated; merely directing an appropriation of part, will not defeat the claim of the heir, will not defeat the heir as to what is to be disposed of; though if a testator has blended his real with his personal fund, and has made a residuary legatee, it will carry all that is not disposed of. The question is, whether she has been explicit in

treating of this as her personal estate; if so, the words will include it: but I take it, the testatrix meant the residue to be distributed in this manner; therefore the decree must be affirmed.

WEST v. The Lord Primate of IRELAND.

[Vide S. C. 2 Cox, 258.] Lincoln's-Inn-Hall, 20th July.

(On a Rehearing.)

Legacy to the seventh, or youngest child of A.—A. had six children, at testator's death, and had had another, who soon died. Afterward the plaintiff was born, and was the seventh child living, but eight in order of birth: held he did not bear the description; and decreed in favor of youngest child. (1)

SIR SEPTIMUS ROBINSON made his will in 1764, containing, *inter alia*, the following words, "I desire that my executor will, at his decease, bequeath 1000 guineas to Lord Cantalupe, for the use of his seventh, or youngest child, in case he should not have a seventh child living."

Lord Cantalupe, at the death of the testator, had six children living. Another child had been born, but was dead. The plaintiff [Septimus Harry West] was the next child born after the death of the testator. Several children were born after. The plaintiff filed his bill, which, upon hearing, was dismissed. It came on, now, upon a petition for a rehearing. In the mean while, Lady Matilda West, the youngest child of Lord Cantalupe, filed a bill for the legacy.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *Campbell*, for the [149] plaintiff, Septimus. The testator must be presumed to be *conusant of the state of Lord Cantalupe's family, and that he had then six children, and, therefore, must have meant the next child, who should come into *esse*, to take the benefit of this legacy. He certainly meant a child that was to be born. The youngest child could not take, unless the seven died before the executor.

Mr. *Emlyn*, for the executor, referred to the case of *Lomax v. Holmden* (1 Vesey, 290), in which it is held that a second son, becoming eldest, shall take under a limitation, in a settlement, to the first son; and the case of the duchy of Cornwall, there cited, where the eldest son living is held to be eldest son; and, from thence, argued that the plaintiff Septimus, when born, bore the description of seventh child.

But Lord CHANCELLOR thought the plaintiff, being, in fact, the eighth child born, could not take by the description of seventh child, and decreed in favor of Lady Matilda as youngest child. (2) (a)

(1) See the Rep. 2 Cox, 258.

(2) Under the bill filed by her; and affirmed the former decree, which had dismissed the bill of Septimus. See 2 Cox, 258, 259.

(a) See *Del Mare v. Rebello*, post, 446, and cases cited in the notes.

ALLAN v. BOWER.* (1) Lincoln's-Inn-Hall, 21st July.

(Reg. Lib. 1789. A. fol. 563. b.)

A final decree cannot be made upon an interlocutory order without consent. [As to the admission of parol evidence in favor of an agreement not in writing.](1)

THE plaintiff, having been some years a servant to the late Robert Bower, of Welham, com., York, Esq., and having been careful of and attentive to him, during severe fits of the gout, Mr. Bower, in the year 1773, let to the plaintiff a farm, at Welham, containing about 150 acres, at a rent of 60*l.* a year, and at the same time, lent him 200*l.* in order to enable him to stock the farm, which sum was afterwards repaid. The farm, at the time, was much out of order from former ill treatment, and Mr. Bower, knowing that it would require time and expense to bring it into proper repair and improvement, agreed with the plaintiff, for the assurance of the possession of the farm, at the said rent of 60*l.* a year, during his life, and undertook to do such acts and execute such instruments as should render the plaintiff secure in the possession of the farm during his life; and the plaintiff, in consideration of such promises, and with the privity of Mr. Bower, made very considerable alterations and improvements in the farm, insomuch as to increase the value of the farm 30*l.* a year.

*Mr. Bower died in Jan. 1777, having first made his will, where- [*150] by he devised the greatest part of his estate, including the farm let to plaintiff, to his wife for life, and, after her decease, to his nephew, the defendant Robert Bower, son of the other defendant, John Bower, for life, with remainders over; and, shortly after his decease, there was found in his house, in an iron chest, among his deeds and writings relative to his estate, a paper writing in the following words, "Whereas William Pattison and John Allan have been at very large expenses in both their farms, which were greatly run out, and I know hurt them much in their circumstances, I desire that they may not be raised in their rents on any account, as I have promised this order should be given by me, as not willing to grant them leases, which was reasonable for me to do, as I know full well the rent would not be paid for some years, the farms being so much out of order. I hope this will be duly observed by those in possession of my estates, as witness my hand this 10th day of October, 1775. Robert Bower." The widow entered upon the estate, and continued in possession till her death in 1786, and, during that time, suffered the plaintiff to occupy the farm at the same rent: but, after the death of the widow, the defendant, John Bower, as guardian to his son Robert Bower, the tenant for life, an infant, served the plaintiff with a notice to quit, dated 21st March, 1786; and afterwards, on the 2d June, caused the plaintiff to be served with a declaration in ejectment: upon which the plaintiff filed his bill, praying a specific performance of the agreement with the late Robert Bower, and that the present defendants might, by the proper mode, assure to plaintiff the continuation of the possession of the farm at the yearly rent of 60*l.* during the joint lives of defendant Robert Bower and plaintiff, and an injunction to restrain defendants from proceeding in the ejectment, and taking other means to turn plaintiff out of possession of the farm.

(1) The bias on Lord Thurlow's mind, and his previous decision in this case, have been questioned upon principle by Lord Redesdale C. vide in *Clinan v. Cooke*, 1 Scho. & Lefroy, 36, 37, and see note (2) and (3) postea, p. 151, 153.

To this bill, the defendants put in their answer, admitting the improvements in the farm, and also admitting the paper writing; but submitted that the paper was, in its nature, testamentary, and affecting to dispose of interests in real property, and not being duly attested, could have no operation; that the plaintiff, having enjoyed the farm till the death of the widow (being upwards of ten years) at the rate of 60*l.* a year, had received the full benefit intended him, and that it was evident, *from [*151] the expression used by the testator in the paper, viz. that "he was not willing to grant leases," that he did not intend the plaintiff a longer enjoyment of the farm at the rent of 60*l.* They stated also that the ejectment had been tried, and a verdict found for defendant Bower.

Upon motion to dissolve the injunction, (2) it was referred to the Master to inquire into the annual value of the farm at the plaintiff's first entering thereon as tenant, and the present annual value; and what term of years was intended to be granted by the paper writing, and, in case he should find that term to be expired, what additional rent ought to be paid, from the time of the recovery of the judgment in ejectment, over and above the 60*l.*

On a commission, the plaintiff examined witnesses to prove declarations of the testator, that he meant, by the paper writing, to secure to the plaintiff his farm, during his life, on payment of his old rent.

The Master made his report, dated 12th March, 1788, and thereby stated that the value of the farm, at the time plaintiff took possession of it, was of the annual value of 60*l.* With regard to the paper, he did not think himself at liberty to receive oral testimony to explain it, but was of opinion, that no term of years was meant to be granted by the testator, and that, by his not granting any lease himself, it was his intention to have his representative at liberty to remove the plaintiff; but, that, whilst he should be permitted to occupy the premises, the rent should not be raised upon him; or, if any term was intended, it was only a term of three years; and he found that the value of the premises had been for several years 100*l.*, and therefore an additional rent of 50*l.* ought to be paid, from the time of the judgment in ejectment.

To this report, exceptions were taken by plaintiff, 1st. to the Master's having declined to receive oral testimony to expound the meaning of the paper writing: 2d. To his having reported that no term was intended: and, 3dly, that, if any term was intended, it was a term of three years only.

(2) The late Sir Samuel Romilly communicated his note of the Lord Chancellor's judgment, and what passed on this occasion, to Lord Colchester, which is as follows:—

"The Lord Chancellor was clearly of opinion, that the injunction ought to be continued; he said that the agreement to grant a life estate to the plaintiff must be abandoned, but that it appeared manifestly, that there was an agreement by Robert Bower to grant the plaintiff some interest which is not expressed, in consideration of certain improvements to be made by him upon the farm; for the paper, signed by Robert Bower, clearly purported that he was under an engagement to grant the plaintiff an interest of some kind in the estate, and an interest which might extend beyond his own life; he therefore suggested to Madocks (defendant's counsel), that it would be for the interest of all parties to refer it immediately to the Master, to inquire and certify what interest in the farm it was intended by the parties to the agreement should be granted to the plaintiff; because such a reference must certainly be made in the cause at last. The rule by which the Master must proceed in the inquiry, he said was very plain; for the plaintiff would be entitled to such a term of years as was of the value of the money which he had laid out in improvements upon the farm; but at the same time he said, as it was possible that the term which the plaintiff was originally entitled to, might by this time have expired, it being eleven years since the agreement was made, the plaintiff must consent that, if the Master should find the term to be granted was such as would before now have expired, he would pay the defendants the increased rent, equal to the actual additional value of the farm from the time of making this order."

"The reference (not being opposed) was made accordingly."

Upon the exceptions coming on to be argued, 4th July, 1788, Lord Chancellor ordered that it should be referred back to the Master to review his report, and to inquire and state what the *promise [*152] was that is mentioned in the instrument, dated 10th October, 1775, and at what time the promise was made, and what interest the tenant was to acquire in the premises under such promise; and the Master was to be at liberty to state specially any particular circumstances that might arise on such inquiries, and the parties were to be examined on interrogatories.

In consequence of this order, another commission for the examination of witnesses issued, and witnesses were examined, who, as they had done before, gave oral evidence of testator's declarations that he intended plaintiff should enjoy the farm for his life.

On the 30th of June, 1789, the Master certified, that, if parol evidence of a lease for life could be admitted, or could substantiate for more than three years, notwithstanding the statute, 29 Cha. 2, any mention of a promise of a lease, in which written mention of such promise, no certain estate, interest, term of the lease so promised, was specified or given to be understood, the Master was of opinion, after receiving the parol evidence therein-before recited, that the terms of the promise, referred to in the instrument, dated 10th October, 1775, could not be now ascertained, nor the time of the promise being made: but, from the said parol evidence, it was to be collected, the interest which the tenant was to acquire in the premises, under such promise, was to have been an interest for life, upon payment of a rent of 60*l.* a year for the same; and that, on the contrary, if the said parol evidence be not decreed admissible within the statute, and be, therefore, laid out of the case, the Master remained of the opinion certified by his former report.

The cause came on for further directions 25th July, 1789, when Lord Chancellor was pleased to declare that the agreement ought to be specifically performed and carried into execution, and decreed accordingly; and that it should be referred to the Master to settle a lease from the defendants to the plaintiff for the term of 99 years, determinable on the life of plaintiff, with proper covenants, and that the defendants should execute the same, and the plaintiff execute a counterpart thereof.

*The defendants presented a petition, stating that the defend- [*153] ant John Bower had no interest in the premises, and defendant Robert Bower was an infant, and tenant for life only of the said farm, and no person having the inheritance brought before the Court, nor any day given to defendant Robert Bower to show cause against the said decree, and, therefore, praying that the cause might be reheard.

In fact, the defendant, Robert Bower, though an infant during the former proceedings, became of age a short time before the decree.

The cause came on now to be reheard.

Mr. *Solicitor-General*, for the plaintiff, stated the proceedings on the record to be as has already been stated, and that the decree proceeded on the ground that the paper writing of the 10th of October, 1775, amounted to a confession of a parol agreement, and that the repair of the estate was the consequence of that agreement, which, it was in evidence, was for a lease for the life of the plaintiff, whom his Lordship had determined to be entitled to relief, and, therefore, had made the decree.

Lord CHANCELLOR spoke to the following effect.

In this case, a decree has been made for specific performance on the

ground of the evidence of the promise, and upon a part-performance by the plaintiff. It seems to me, that such a promise will sustain a specific performance, and, therefore, as I could not determine, on the injunction, that he had no right to a specific performance, I think the orders right; (a) but I have great doubt as to the propriety of the decree. (3)

My doubt is as to the matter of form; and, in that respect, I do not know how the decree is to be supported.

It seems to be the rule, that the parties should go to commission; and that a decree cannot be made upon an interlocutory order, without consent. (b)

The order must be to set aside the decretal order, and leave the case *in statu quo*.

(3) Lord Redesdale observed (1 Scho. & Lefroy, 37), that "any person who reads this decision will find that Lord Thurlow did not feel himself very strong when he delivered this opinion; and that there was something of the same impression as was on his mind in the case of *Tawney v. Crowther*" (postea, 318), which decision Lord R. also questions. Vide also, 1 Scho. & Lefr. 33. The previous remarks of Lord R. on the principal case are as follows (p. 36):—

"The case of *Allan v. Bower*, appears in 3 Bro. C. C. 149, to have come on again on a rehearing, and upon that rehearing it appeared that the proceeding was in itself irregular; that it was a decree made, not when the cause was at hearing, but upon a motion for an injunction, and therefore Lord Thurlow was under the necessity of setting it aside as being irregularly made. I know it never came on again. Whether the decision would have been the same if it had, I cannot venture to say; but that must at all events have depended on its being, or not being, considered a part execution of a parol agreement; for Lord Thurlow thought the paper left behind by Mr. Bower, showed that he had come to some parol agreement, and having done so, he had let the plaintiff into possession, and that the plaintiff had laid out great sums of money on the farm. This he considered as proved by that paper, which he considered as a confession by Bower of that fact, and this he thought sufficient ground for directing an inquiry what was the agreement entered into, to which that paper referred. That is, he considered that paper, not as an agreement to be supplied by parol evidence, but as evidence of a parol agreement. There were very great doubts whether that was a solid opinion, though Lord Thurlow took it up very strongly, and his decisions were very seldom unsatisfactory."

Lord R., after referring (as above) to *Tawney v. Crowther*, and recurring to the principal case, observes, "that when the expressions of the party were, 'that he had not given his tenant a lease because he was not willing to grant leases,' Lord Thurlow held this an agreement to grant a lease. I confess my mind could never follow these two cases, and there was great doubt amongst the bar on both of them. However, I think neither of these cases decided the present. So far as they touch it, they rather confirm the opinion I have formed, and particularly *Tawney v. Crowther*; for there Lord Thurlow considered the letter as referring distinctly to the other paper." 1 Scho. & Lefr. 37.

(a) See *Whitechurch v. Bevis*, 2 Bro. C. C. 566, and notes; 2 Story, Eq. Jur. ch. 18, § 759–763, 764, and cases cited; 1 Sugden, Vend. & Purch. (6th Am. edit.) ch. 3, § 7, *passim*, ib. p. 210–216, art. 19, &c. and cases cited in notes; Colson v. Thompson, 2 Wheat. 336, 341; Phillips v. Thompson, 1 John. Ch. 131; Parkhurst v. Van Cortlandt, 1 John. Ch. 273; 1 Madd. Ch. Pr. (4th Am. edit.) 376, 377; *Tawney v. Crowther*, post, 318, and notes.

(b) See 2 Madd. Ch. Pr. (4th Am. edit.) 452, 453.

[*154] *RONDEAU v. WYATT. Lincoln's-Inn-Hall, 21st July.

(Reg. Lib. 1789. A. fol. 602.)

Plea of the statute of frauds, to an executory contract, overruled. (1)

THIS was a bill filed relative to a contract for corn. It stated that the plaintiff, on the 3d July, proposed to the defendant, to purchase of him and his partners (the proprietors of the Albion Mill) 6000 sacks of flour,

(1) Sed vide S. C. in C. P. & K. B. 2 H. Bl. 63, & 7 T. R. 14, where it was settled that executory contracts were within the provisions of the statute. { See post, 156, note (a). }

at 41s. per sack; that the defendant then said he could not give him an answer, but afterwards, having consulted his partners, met the plaintiff, and said he could not let him have 6000 sacks, but that he should have 3000, which should be shipped on board vessels in the river Thames, and proposed to have the agreement reduced into writing; that some clerk of the defendant's made some entry of the agreement in the defendant's books: that the plaintiff, on the 8th July, sent 1000 sacks for part of the flour, and the defendant, or his servants, put the flour on board of barges, in order to its delivery; but the defendant (on the rise of the value of flour) ordered the boats to be unloaded, and refuses to deliver the same. The bill prayed a discovery of the facts, and names of the partners in the undertaking, in order to found an action at law.

To this bill, the defendant pleaded the statute 29 C. 2, of frauds and perjuries: and, by averment, negatived the exceptions in the statute; and the plea was supported by an answer.

The plea had been argued before, 16th June, 1789, and was then overruled, because the matter was wholly at law. Lord Chancellor said it was not like the case of land, where the plaintiff may amend his bill, and pray a specific performance, which cannot be as to the delivery of goods.

The plea was, however, by consent, set down to be argued again.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *Alexander*, now argued that this was a good plea. Even taking the bill to be proved as to those circumstances which are denied, the defendant is protected from a discovery of matter which, if discovered, would be nugatory. In this case, the bill prays no equitable relief, therefore it is reduced to this, that it prays the confession *of an agreement upon which no remedy can be had. [*155] The contract itself, being for the sale of goods, is void, unless it is attended by the solemnities required by the statute. In the case of *Towers v. Osborn*, 1 Strange, 506, it was a contract out of the range of the statute, as being future: here the contract is within the statute, as it is a contract to be performed immediately. In *Debigge v. Lord Howe*, (2) 1782, Colonel Debigge filed a bill against Lord Howe, stating that he had done services for government, and that Lord Howe had contracted to pay him; and praying a discovery, in order to found an action at law: Lord Howe demurred, and the demurrer was allowed, because the Court was of opinion the case would not support the action. The cases of *Baker v. Pritchard*, 2 Atk. 387; *Dinely v. Dinely*, 2 Atk. 394, and 2 Vesey, 396, show that a court of equity will not suffer a person to come here for discovery of that which is not material to some suit either at law or in equity.

Mr. *Hollist*, for the plaintiff. It is assumed here, that there is no cause of action. If that point is doubtful, the idea ought to be overruled. I take the case to be out of the statute, which has not been held to extend to executory contracts. *Towers v. Osborn*, Strange, 506; *Clayton v. Andrews*, 4 Burrow, 2101; *Simeon v. Metivier*, Buller's Nisi Prius, 280. This contract is executory. The agreement made the 3d July is for flour to be put on board the plaintiff's ship, if the plaintiff could obtain leave to export. On the 8th July he obtained leave. The bill then states, that the defendant put the corn on board lighters, to be carried on board the ship. The contract is executory in that respect; but it is further so, for it is, that, if the plaintiff could not obtain leave to send it from London, he

(2) See Lord Redesdale, T. 152 (3d edit.), and Beames's El. Pl. 276, 277.

could sell it at Liverpool, and the order to put the corn on board was not countermanded till the 10th.

Lord CHANCELLOR. If, upon the face of the bill, it appears that there can be no remedy, you shall not have a discovery which is merely impertinent. (3) I should have thought that the mere fact of the corn not being to be delivered immediately, would not have taken it out of the statute. Here the plaintiff was to send his own sacks to be filled, and to be sent on board the ship. This way of taking it out of the statute is what one [*156] would not determine in a new case. (4) I therefore do not *go upon its being out of the statute; but, if it is a measuring cast, and upon cases at law which must stand till they are revised by a court of law, (5) it is held to be out of the statute; I cannot, sitting in a court of equity, say that the cases are improperly settled at law. I should think the putting the corn in the barges a delivery.

Plea overruled. (5) (a)

(3) See *Hindman v. Taylor*, ante, 2 vol. 7, and 8, & notes and cases cited. }

(4) Vide, as to the Stat. of Limitations, *Baillie v. Sibbald*, 15 Ves. 186.

(5) It was, however, finally settled at law in the principal case, that executory contracts are within the provisions of the statute, vide S. C. 2 H. Bl. Rep. 63, and 7 T. R. 14. (a)

(a) The statute of frauds extends to all contracts, for the sale and delivery of goods as well executory as executed. *Jackson v. Covert*, 5 Wend. 139; *Eichelberger v. M'Cauley*, 5 Har. & John. 213. But where the contract is for the manufacture and delivery of goods, or strictly for work and labor to be performed, and materials found, the case is not within the statute. *Sewall v. Fitch*, 8 Cowen, 215; *Mixer v. Howarth*, 21 Pick. 205; *Dowds v. Ross*, 23 Wend. 270; *Hight v. Ripley*, 19 Maine, 137; *Spencer v. Cone*, 1 Metcalf, 283; 2 Kent, (5th ed.) 504; *Eichelberger v. M'Cauley*, 5 Har. & John. 213; *Groves v. Buck*, 3 Maul. & Sel. 173; *Chitty, Cont.* (6th Am. edit.) 387. The cases of *Towers v. Osborne*, 1 Str. 506, and *Clayton v. Andrews*, 4 Burr. 2101, upon the authority of which the Lord Chancellor made the decision in the principal case, are said to have been determined rightly, though on a wrong principle; the first being a case of a contract for the manufacture and delivery of a coach, and the second for grain yet to be threshed; in *Sewall v. Fitch*, 8 Cowen, 219. See, as to the unthreshed grain, *Eichelberger v. M'Cauley*, 5 Har. & John. 213. *Jackson v. Covert*, cited supra, resembled the case in the text; but it was there held, in conformity with the law, as now well settled, that the mere fact of the article sold, not being to be delivered immediately, does not take the case out of the statute. See also *Bennett v. Hull*, 10 John. 364; *Crookshank v. Burrell*, 18 John. 58.

HAWES v. WYATT.

Lincoln's-Inn-Hall, 21st July. [Vide S. C. on the hearing at the Rolls, 2 Cox, 263.]

(Reg. Lib. 1789. A. fol. 483.)

A deed obtained by fraud, not a revocation of a prior will. (1)

FRANCIS HAWES (a common sailor) being seised of the remainder in fee of an estate near Marlow, com, Bucks, subject to the life estate of his father, made his will, duly attested, 2d July, 1785, and thereby gave this estate in reversion to the plaintiff, (2) in trust for his mother, during her

(1) *Hick v. Mors*, before Lord Hardwicke C., Ambler, 215, was directly contrary to the ultimate decision in this case; but it appears from Lord Colchester's notes, and otherwise, that it was not cited on either of the hearings. Lord Eldon's opinion seems clearly in favor of the judgment of the M. R., and of Lord Hardwicke, in *Hick v. Mors*, that it would be a revocation. Vide in the E. of Ilchester's case, 7 Ves. 373, 374. See also in *Attorney-General v. Vigor*, 8 Ves. 283. Vide also per Sir W. Grant, M. R., 6 Ves. 215.

(2) Lord Redesdale's notes refer to *Blake v. Johnson*, Prec. Ch. 142, and to 2 Cox, 265. Likewise to *Gibbons v. Biddulph*, 27th June, 1737.

natural life, remainder to the plaintiff in fee, subject to payment of 100*l.* as therein appointed.

The testator having been much distressed, and being at the time absolutely dependent on his father, William Hawes, who had the life-estate in the premises, the latter, about the time of the making of the will formed a scheme of getting, from the son, the remainder in fee in the estate, and obtained deeds to be prepared, by which the son should convey the remainder to the father, in consideration of a nominal debt. Indentures of lease and release were accordingly prepared, bearing date in the month of July, 1785, between the son of the first part, and the father of the second part; reciting, that the son was indebted to the father in the sum of 1000*l.*, and had agreed, in satisfaction thereof, to convey his remainder in fee, by which it was witnessed, that, in pursuance thereof, he conveyed his said remainder to the father, his heirs and assigns for ever: and the father prevailed upon the son, by threats and promises, to execute the same, although no such debt was really due.

The son, after executing the deeds, expressed great disapprobation and concern at having been constrained so to do; and being in debt, and the father having refused to support him, *was compelled to [*157] go to sea; which he did, on board an East India ship, and died in October 1786, in China.

The father having obtained the conveyance, made his will, 30th of March, 1786, and, thereby, devised the estate to trustees, to the use of his wife for life; remainder to the son for life; remainder to his issue; remainder to the defendants; and died about April, 1787.

The bill prayed that the conveyance to the father might be set aside, as having been obtained by fraud, imposition, and duress, and might be delivered up to the plaintiff, or, in case it should appear that Francis the son was indebted to the father, at the time of the execution thereof, in any sum of money, that the conveyance might stand as a security for such sum; and, upon payment thereof, the infant defendants might, when they should attain twenty-one, reconvey the same; and plaintiff, in the mean time, might hold and enjoy the premises.

The plaintiff examined witnesses, who completely proved his case, that the deed was fraudulently obtained, without any preceding debt, or reason for the same.

The defendants produced, at the hearing, a common seaman's will (of a subsequent date, in the father's favor); the signature to which they proved to be of the testator's handwriting.

The cause was several days in hearing at the Rolls; and at length his Honor gave judgment; when he expressed himself satisfied that the deeds were fraudulently obtained; but being of opinion that they operated as a revocation of the will, (3) he dismissed the plaintiff's bill. (a)

The plaintiff, afterwards, appealed to the Lord Chancellor, on the ground that he ought to have had relief, or the question whether the deeds operated as a revocation should have been put in a course of legal inquiry.

(3) Upon the ground, it seems, that the son considered the will as absolutely revoked. Vide 7 Ves. 373, 374.

(a) See a full report of the decision of the Master of the Rolls in this case, given in 2 Cox, 263, &c., which decision has been held to be the most correct by subsequent Judges; for which, see cases cited in note (1), ante, page 156.

The appeal came on now to be heard before Lord Chancellor.

[*158] *Mr. *Mansfield*, Mr. *Graham*, and Mr. *Hollist*, for the plaintiff.

It is not necessary, now, to use any argument as to the validity of the deed; it may be taken for granted, that that point is given up; the only question now is, whether it can have the effect of revoking the will. It was agitated below whether the deed was not void at law; and if so, whether, at law, it could be a revocation: but the cases, at law, are too strong to show that ineffective conveyances may operate as revocations. *Dister v. Dister*, 3 Levinz, 108.

But, though not void, and supposing it would be a revocation there, it is not so in equity. The cases at law, which it is most similar to, are those where deeds are obtained by duress or *per minas*; and those circumstances will avoid, even at law, deeds clearly executed and known to the parties. Upon this principle the deed is void, the fraud vitiates it; being done under the eye of the father, and the abuse of parental authority, is a sufficient ground for setting aside deeds, *Glissen v. Ogden*, cited 2 Atk. 258; and the insertion of a consideration makes it so much the worse. A deed which must be avoided at law cannot operate as a revocation.

But supposing a debt had really been proved, the Court could only have held the conveyance to be a security: and a mortgage, though in fee, is no revocation, *Vernon v. Jones*, Pre. Ch. 32; 2 Vern. 241: there, though there was a trust to sell for payment of debts, the mortgage was held only a revocation *pro tanto*.

All the cases of implied revocations are before the statute of frauds, and are very much shaken by the case of *Parsons v. Freeman*, 3 Atk. 751. In that case, Lord Hardwicke rested its being a revocation upon new uses being declared; he lays it down, that the recovery, without declaring new uses, would be no revocation; he says, "the construction must arise from a presumed intention, that the testator would not have made a new conveyance without an intention to revoke his will;" apply this doctrine to the present case, and there could not be an intention here to revoke the will. He did not mean to do an act by which he should be bound.

[*159] *Lord *Mansfield*, in *Wright* on the demise of *Clymer v. Littler*, 3 Bur. 1256, thought that a fraudulent deed could not operate as a revocation.

Here the plaintiff only prays, that the deeds may be delivered up; he does not pray a reconveyance.

The subsequent will is not proved; if it had, it would have been shown to have been procured in the same way with the deed.

Mr. *Solicitor-General*, for the defendants.

The present question is, only, whether the devisees under the prior will can say they are entitled, though the maker of the will made this conveyance, and never showed any inclination to undo it, and died with the intention that the conveyance should have its effect. If the party himself did not impeach the transaction, the devisee cannot set up the will against it. There is no case where relief has been given, under such circumstances. There are many cases where devisees have been relieved, but they are all of devises subsequent to the act which is set aside. If this was the case of an heir-at-law, he could not be relieved, where the party conveying lived a year and a half and more, and never sought a remedy against the conveyance. That the father, in this case, did not

mean to rob the son, is clear. It is in evidence, that the son was extravagant; the father wished to secure this reversion from the effects of his extravagance: the giving the son a life estate in the premises, shows he meant only to settle the estate. The son, certainly, never impeached the transaction, which was of such a nature that he might have affirmed it: or, having only an equity remaining, he might have released it by parol. In the present case, the intention of the party, when he executed the conveyance, was, that the will should not subsist. But it is said to be only a mortgage; and that, if so, it is only a revocation *pro tanto*. But, on the contrary, it is an absolute conveyance, without the least pretence to say it is a security.

It is difficult to say, that, where the testator, at the time of the execution of the deed, intended that the devisee should not have any claim, that intent shall not prevail, because it was shown by an *act ob-* [*160] tained by undue means. The equitable estate, which he obtained in consequence of the fraud, was a new estate, different from that which he had at the making of the will; and there is nothing to show, that he meant to make the same disposition that he had made before: on the contrary, by the subsequent will, he has shown his father was the object of his bounty. If this is not a revocation, what will be sufficient to show that the former devisee is not to take?

LORD CHANCELLOR. The remedy prayed is, that the deed shall be given up. If I give it up, I treat it as a mortgage merely in order to do justice, if there is any demand; and, if not, and I deliver up the deed, shall I still say that it is a revocation? Whoever orders the deed to be delivered up, declares it to be no deed. If the party had come himself, must he not have had the deed delivered up? The act might have been in evidence, to show that the testator approved the transaction: as it is, they have only proved the handwriting; and the instrument has no effect. If no money is shown to be really due, the deed must be delivered up. (b)

Decree of dismissal reversed. (4) (c)

(4) The decision of the M. R. has been repeatedly held preferable to that of Lord Thurlow on this occasion. See the references in note (1) *antea*, p. 156.

(b) See 1 Story, Eq. Jur. ch. 6, § 239, § 7, § 309, and cases cited.

(c) A deed executed under circumstances which render it void in equity, and not at law, is a revocation of a prior will. *Simpson v. Walker*, 5 Sim. 1.

A conveyance inoperative for want of completion, or incapacity in the grantee, may amount to a revocation, if it shows the intention of the testator to revoke his will. *Walton v. Walton*, 7 John. Ch. 269. See *Hodges v. Green*, 4 Russ. 28.

PITT v. LORD CAMELFORD.

[Vide S. C. *antea*, 2 vol. 51.] Lincoln's-Inn-Hall, 21st July.

(Reg. Lib. 1789. B. fol. 673. b.)

Testator reciting that he is possessed of a certain sum in navy bills, bequeaths it. This is a specific legacy, and shall pass only such navy bills as he possessed at his death. (1)

THIS was a branch of the case of *Pitt v. Jackson*, reported vol. ii. p. 51.

(1) Vide Roper on Legacies, 1 vol. p. 7, et seq.

Pinkney Wilkinson, by a codicil to his will, bearing date the 25th December, 1781, reciting, that he was possessed of about 7000*l.* navy bills, gave the same to his executors, to receive the interest, and to lay the same out in the funds, to such uses as his daughter, Ann Pitt, should appoint. At the time of making the codicil, he had 7029*l.* navy bills; he afterwards purchased other navy bills, and also victualling bills, and sold others. At the time of his decease, he was possessed of only 4300*l.* navy bills, though he was possessed of various victualling bills. It had been referred to the Master, to inquire what was intended to pass.

[*161] *The Master reported the particular sums which the testator possessed in navy and victualling bills, at the time of the codicil made, and of his death; and further, that navy and victualling bills were considered as synonymous, by the brokers, and persons concerned in buying and selling them, as bearing the same price.

It came on now upon the Master's report.

Mr. *Attorney-General* argued, that this was a specific legacy, and could only pass navy bills, strictly so called, and those only which he possessed at his death; although these two sorts of bills are of a similar nature; as testator giving one species of property, cannot be intended to mean another to pass.

Mr. *Mansfield*, and Mr. *Graham*, for the legatee, contended she was entitled to all the bills. This is a fluctuating property, and the bills so much of the same nature, that a broker, who is instructed to buy one sort, thinks he has executed his commission by buying the other. They are considered as completely synonymous. According to the true construction, it is not a specific legacy, but is rather a description of the money than of the fund. (2)

Lord CHANCELLOR said, if ever there was a specific legacy, this was so: if they had continued, and other legacies had exhausted the personal estate, these could not have abated. (a)

He therefore decreed the funds purchased with the navy bills, of which testator was possessed at his decease, to pass.

(2) See 1 Roper on Leg. 7, &c.

(a) See the cases illustrating this subject, in the notes to *Ashburner v. Macguire*, 2 Bro. C. C. 108, &c.; 2 Williams, Ex. Pt. 3, Bk. 3, ch. 2, § 3, p. 744, 745.

TAWNEY, Knt. v. CROWTHER, and Another.

[Vide S. C. postea, 318.] Lincoln's-Inn-Hall, 23d July.

(No entry.)

Defendant having acknowledged, by letter, an agreement for sale of an estate, takes it out of the statute of frauds. (1)

DEFENDANT Crowther, being seised of a house called the White Hart Inn, in Benson com, Oxford, which he was desirous of selling, the plaintiff employed the other defendant, Morrell, an attorney at Oxford, to treat for the purchase; who agreed to give, and Crowther to take, 1100*l.*: and

(1) See note (1) next page.

it was agreed between them, that the agreement should be reduced into writing, in order to be signed: it was accordingly reduced into *writing; (1) but Crowther, wishing to receive the rent due at [*162] Michaelmas, possession was not to be delivered till then; but the defendant declared, that his word was as good as his bond, and that he should be in Oxford on the Tuesday morning, and would then call on defendant Morrell and sign the agreement: Defendant Crowther not coming on the Tuesday morning to Oxford, defendant Morrell wrote a letter to him, saying that, "though he had no doubt Crowther's word would be, as he had declared, as good as his bond; yet as life was uncertain, he wished the agreement to be signed." In answer to this, defendant Crowther wrote a letter, in which he stated his having been from home, and acknowledged he said his word should be as good as a bond, and that there was time enough sufficient from thence till Michaelmas, to settle everything; and again repeated once more, that his word should always be as good as any security he could give. This letter was afterwards stamped.

Defendant Crowther, afterwards, refusing to complete the agreement, plaintiff filed his bill for a specific performance.

To this bill, the defendant pleaded the statute of frauds; averring, that there was no contract in writing.

But Lord CHANCELLOR, thinking the letter sufficient to prevent the operation of the statute, (a)

Overruled the plea. (2)

(1) See *Forster v. Hale*, 3 Ves. 696, 713. Lord Redesdale C., however, questioned the principle adopted in the ultimate decision of the principal case, *postea*, 318, &c. Vide in *Clinan v. Cook*, 1 Scho. & Lefr. 37, and see the Editor's note to *Allan v. Bower*, *antea*, 163.

(2) See this case at the hearing, *postea*, 318.

(a) See notes to this case, *post*, 318, and cases there cited; 1 Sugden, *Vend. & Purch.* (6th Am. edit.) ch. 3, § 3, p. 120 [168], *et seq.*; *Tanner v. Smart*, 6 Barn. & Cres. 603.

LOWTHIAN v. HASEL. Lincoln's-Inn-Hall, 23d July.

(Reg. Lib. 1789. B. fol. 693. b.)

Mortgagee, having also a bond, cannot tack it, against other specialty creditors; though he may against the heir. (1)

UPON further directions, the only question was, whether Mr. Garforth, a creditor of Andrew Whelpdale deceased, by mortgage, who also was a bond creditor for 1834l. 3s., should tack his bond debt to his mortgage, against other specialty creditors.

Mr. *Solicitor-General*, Mr. *Lloyd*, and Mr. *Alexander*, insisted, on the part of the general creditors, that there was no case where this had been permitted against other bond creditors, though it was allowed against the heir of the debtor; and for *this they cited the anonymous case, (2) 2 Vesey, 662; and Mr. Alexander said, it appeared

(1) See *Jackson v. Langford* (above cited as *Anon.*), 2 Ves. 662; *Jones v. Smith*, 2 Ves. jun. 372, 376, 379, &c.; *Adams v. Claxton*, 6 Ves. 226, &c.; *Ex parte Knott*, 11 Ves. 609, &c.

(2) The name of it is *Jackson v. Langford*. See the 4th ed. of Vesey, and the Supplement to Vesey, p. 436.

by the Register's book, that the same was determined in *Hartwell v. Chitters*, which is reported, Amb. 308.

Mr. *Graham*, for Mr. Garforth, said, that 2 Vern. 662, did not apply to the present case; that there, other creditors meant creditors of an higher nature, or creditors under the trust-deed. In *Powis v. Corbet*, 3 Atk. 556, Lord Hardwicke confines it to the case of creditors of a superior nature; but, from the nature of the thing, creditors whose debts are of the same nature, are within the rule. If the heir is precluded from redeeming, without paying the bond debts, the mortgagee must certainly be preferred to other creditors; *Coleman v. Winch*, 1 Williams, 775; *Troughton v. Troughton*, 3 Atk. 656.

Lord CHANCELLOR said, the only reason why the mortgagee can tack his bond to his mortgage, is to prevent a circuitry of suits: it is solely matter of arrangement, for that purpose; for in natural justice the right has no foundation. The principle explains the rule; and, therefore, it can go no further; the creditor having another specific security, cannot give him in justice any priority. There being no foundation in justice, the only question is, whether the Court is in the practice of doing it; and it has not done it in any case but that of the heir, and merely to prevent circuitry. (3) (a)

(3) There were many special directions in this case as to legal and equitable assets. Vide R. L. 694, b. and 695.

(a) See Fonbl. Eq. Bk. 3, ch. 1, § 9, and notes (u) (x); 1 Story, Eq. Jur. ch. 7, § 413, 417, 418; 2 ib. ch. 27, § 1034. As to the doctrine of tacking, see the notes and cases cited in *Robinson v. Davison*, 1 Bro. C. C. 63, &c.; Cox's note to *Brace v. Marlborough*, 2 P. Wms. 491; *Hagshaw v. Yates*, 1 Strange, 240; *Belchier v. Butler*, 1 Eden, 523, and notes; *Hamerton v. Rogers*, 1 Ves. jr. 513.

PRICE v. WILLIAMS.

[Vide S. C. 1 Ves. jun. 365.] Lincoln's-Inn-Hall, 4th July.

Exceptions will not lie to an award, (1) but the same topics may be a ground for a motion to set it aside.

EXCEPTIONS to an award.

Mr. *Attorney-General* moved to discharge the order, on the ground that the award was final, being made by persons appointed judges by the parties themselves.

Mr. *Solicitor-General*, for the exceptant, cited the cases of *Cresly v. Carrington*, 1 Vern. 469; and *Hide v. Cooth*, 2 Vern. 109, that exceptions may be taken to an award.

[*164] *Lord CHANCELLOR said, if it remained open to exceptions, it seemed to be rather a reference than an award; that it was intended, in the present case, that the whole matter should be referred, in exclusion of the Court, except as to the costs: and that he did not at all agree with the cases in *Vernon*. (a) The proper way would be, to move

(1) This is very incorrectly stated, and the report wholly defective. The distinction appears to be, that exceptions will lie to an award where the reference is merely *ad computandum*; but contra, if it extends to all matters in difference. See the Editor's note to *Woodbridge v. Hilton*, *antea*, 1 vol. 398; S. C. 2 Dick. 640; 1 Raithby's Vern. 469; 2 Vern. 79, 80, 109, &c.

(a) See the rule, and the qualifications, stated in 2 Story, Eq. Jur. ch. 40, § 1454-1456.

to set aside the award; and the topics in the exceptions would apply to such a motion, a mistake in the arbitrator being a ground to set aside an award. (c)

(c) See 2 Story, Eq. Jur. ch. 40, § 1453; *Schenck v. Cutterell*, 1 Green, Ch. 297; *Strodes v. Patton*, 1 Brock. 228; *Head v. Muir*, 3 Rand. 122; *Cullant v. Downey*, 2 J. J. Marsh. 348; *Alwyn v. Perkins*, 3 Desaus. 297; *Ryan v. Blount*, Dev. Eq. 332; *Gregory v. Seamons*, 1 Root. 367. An award is not to be set aside for misjudgment, or mistake, unless it be manifest upon the face of the award, and indicate the award not to be such as was intended. *Cleaveland v. Dixon*, 4 J. J. Marsh. 228. See also the cases cited above, and *Campbell v. Western*, 3 Paige, 124; *Herrick v. Blair*, 1 John. Ch. 101; *Shermer v. Beale*, 1 Wash. 11; *Shepherd v. Merrill*, 2 John. Ch. 276; *M'Calmont v. Whitaker*, 3 Rawle, 84; *Learned v. Bellows*, 8 Vermt. 79; *Baker v. Crockett*, Hardin, 398; *Bumpass v. Webb*, 4 Porter, 65; *Askew v. Kennedy*, 1 Bailey, 46. See also the American cases cited in 1 Metcalf & Perkins's Dig. Tit. Arb. & Award. art. 4, divis. (g), Pl. 419 et seq.; *Dick v. Milligan*, 4 Bro. C. C. 117, and cases cited; *Bouck v. Wilbur*, 4 John. Ch. 405; *Underhill v. Van Courtland*, 2 John. Ch. 264; *S. C.* 17 John. 405; *Morris v. Ross*, 2 Hen. & Munf. 408; *Eden on Injunct.* (2d Am. edit.) 19, 20, and notes.

SITTINGS BEFORE

*MICHAELMAS TERM.

[*165]

31 Geo. 3. 1790.

ATTORNEY-GENERAL v. CHRIST'S HOSPITAL. (1)

(Reg. Lib. 1789. A. fol. 591.)

Where an estate is given upon condition, the taking the possession binds to the performance of the condition, though there be a loss. (2).

AN estate being devised to Christ's Hospital, on condition (1) of maintaining six children from the parish of St. Leonard, Shoreditch, and the hospital having taken possession; the rents, at first, proved insufficient to maintain the number, and the hospital had maintained only three, and an account having been exhibited to the governors, the latter had been satisfied. But, upon filing the information, it was found that there

(1) This report is very incorrect, throughout. Lord Redesdale observes, that "the words of the will were such as to induce a construction by the hospital, that they were to maintain only to the extent of the rents." From Lord Redesdale's MS. notes. — This is confirmed by the Reg. Book.

It appears from R. L. that the testator "gave the estates (after his wife's death) to the Lord Mayor and Aldermen of London, to the intent, that, during certain under-leases thereon, they should maintain and keep out of the rents and profits, three poor children from the parish of St. Leonard, Shoreditch, and should pay 5*l.* for each of their apprentice-fees; and after the end of the said under-leases, when the premises would be improved to a far greater yearly value, they should maintain and keep out of the said rents and profits, six poor children, at the least, born in the said parish, with like apprentice-fees." The information alleged the under-lease had expired, and the rental much improved. A decree had directed various accounts and inquiries, as to the number of children capable of being maintained out of the rents, in pursuance of which the Master had certified, that the improved rents were sufficient to maintain six poor children and no more, and to pay the 5*l.* a-piece for each of their apprentice-fees. The cause therefore coming on for further directions on the Master's report, the Lord Chancellor declared, that the defendants, "the Governors of the Hospital, having accepted the estates devised by the will of the said testator, they are bound to observe the terms upon which they are given, and that, according to those terms, the churchwardens, and overseers of the poor, of the parish of St. Leonard, Shoreditch, have a right, from time to time, to present six children of the said parish, in order to be received and placed on the foundation of the said hospital." Which was ordered accordingly. — R. L.

(2) Vide *Lord Ewre v. Strickland*, 1 Bulstr. 21, & *Cro. Jac.* 240; *Brett v. Cumberland*, *Cro. Jac.* 521, &c.

had been a mistake in the account, and the rents had not been expended, and it appeared the rents were now sufficient to maintain the whole number.

LORD CHANCELLOR thought, whether the rents were or were not sufficient to maintain the number, the hospital, having taken possession of the estate, was bound to perform the condition, and that they should have considered of that previous to taking possession. (1) (a)

(1) See note (1) in the preceding page.

(a) *Spofford v. Manning*, 6 Paige, 383; *Messenger v. Andrews*, 4 Russ. 478.

So, if a party accepts of an agreement from which he is to derive a benefit, when he shall have performed an act on or before a certain day, such acceptance is equivalent to an affirmative agreement, on his part, to perform the act by the time stated. *Roberts v. Marston*, 20 Maine, 275. See also *Hubbard v. Coolidge*, 1 Metcalf, 84. As to the liability of persons taking estates subject to charges, with notice, see *Swasey v. Little*, 7 Pick. 296; *Taft v. Morse*, 4 Metcalf, 523; *Gardner v. Gardner*, 3 Mason, 178; *S. C.* 12 Wheat. 498; *Sands v. Champlin*, 1 Story, C. C. 376.

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*MICHAELMAS TERM.

31 Geo. 3. 1790.

ATTORNEY-GENERAL v. OGLANDER.

When a charity is so given that there can be no objects, the Court will order a different scheme, but not so because objects do not at present (but may) exist. (1)

LORD CHANCELLOR said, that although where a charity is so given that there can be no objects of it, the Court will order a different scheme to be laid before it, yet if the objects may exist, though they do not at present (as widows, though no widows are at present among the number); it will not. (1) (a)

(1) This may be so generally; as in *Attorney-General v. The Bishop of Chester*, ante, 1 vol. 444; but it appears not to be the case universally. In the *Attorney-General v. Hicks*, Ch. 24th February, 1809, and 22d January, 1810, where the original foundation was for the reception of lepers; and that disease had become almost extinct, the Court in the first instance referred it to the Master, to approve of a scheme for the future application of the rents, &c. of the estates; and afterwards confirmed the Master's report, who had approved of a scheme for the application of the revenues for the benefit of a general infirmary existent in the same county (Cornwall); reserving, however, a preference as to all cases for the admission of all leprous patients that might offer themselves, without the recommendation of governors, &c. Editor's MS. note at the hearing, and from the papers in the cause. It appears from the Master's report, that the eminent medical gentleman who gave evidence before him (Dr. Willan) had only known three persons afflicted with the leprosy in the course of his whole practice; all of whom had brought it from the West Indies. And that gentleman also stated his opinion, that the disease was not infectious except in warm climates.

(a) See 2 Story, Eq. Jur. ch. 32, § 1069, 1170 a, and the notes, ib. § 1190, and notes; Fonbl. Eq. Bk. 2, Pt. 2, ch. 1, § 3, note (i); *White v. White*, 1 Bro. C. C. 12, and notes; *Moggridge v. Thackwell*, 3 Bro. C. C. 517; *Atty. Genl. v. Bishop of Chester*, 1 Bro. C. C. 444, and notes, and cases cited.

LUCAS v. COMMERFORD. [8th Nov.] [S. C. 1 Ves. jun. 235.]

(Reg. Lib. 1790. B. fol. 99. b.)

The defendant having taken a deposit of a lease as a collateral security, decreed to take an assignment. (1) [As to whether a court of equity will decree specific performance of covenants to rebuild.] (2)

IN September, 1773, Francis Atkinson demised to Richard Stapleton, certain premises, containing four messuages, &c. in Lambeth, com. Surrey, for the term of seventy-one years, under the reserved rent of 14*l.*, 14*s.* for the first ten years, of a pepper-corn for the eleventh year of the term, and of 12*l.* 12*s.* for the remaining sixty years of the term; and there was a covenant in the lease, that Stapleton, his executors, administrators, or assigns, should, in the eleventh year of the lease, pull down and substantially rebuild (2) the four houses situate on the premises. The defendant having, afterwards, 28th March, 1776, lent to Stapleton the sum of 100*l.*, the latter gave him his bond for 200*l.*, with a condition for payment of the money, and a covenant that the premises comprised in the lease should be subject to the payment of such sums. The lease was accordingly deposited with the defendant, but no assignment of it was ever executed. And in 1782, Atkinson conveyed the premises, subject to the lease, to the plaintiff: and was since dead insolvent.

*The defendant took, and continued in possession. About the 4th [*167] of July, 1785 (the year when, according to the covenant, the lessee was to rebuild), the plaintiff's agent accepted from the defendant Commerford, 14*l.* 14*s.* as the rent due for that year, but upon settling his accounts with the plaintiff, the mistake was discovered, and application was made to the defendant to rebuild, which he refused, on which the present bill was filed for a specific performance of the covenant contained in his lease.

The defendant, by his answer, stated the fact of the deposit by way of mortgage as above, and insisted that, having no title but as mortgagee, he was not bound to rebuild.

The other defendants, who were the representatives of Stapleton, stated his insolvency and death.

Mr. *Mitford*, for the plaintiff, contended, that, in this case, a specific performance ought to be decreed, and for this purpose cited *The City of London v. Nash*, 1 Vesey, 12; more fully reported 3 Atkyns, 512, where Lord Hardwicke laid it down, that, upon a covenant to rebuild, the landlord may come here for a specific performance, as the not building takes away his security.

Mr. *Mansfield*, for the defendant Commerford, said, that the defendant having come into possession of this lease, merely as a deposit, it would be very hard he should be obliged to increase his loan by rebuilding, especially as the representatives of Stapleton might pay him off and retake possession.

(1) No question arose in this case as to the insertion of any particular covenants. With regard to such questions, see *Pember v. Mather*, ante, 1 vol. 53; *Staines v. Morris*, 1 Ves. & Beames, 8; *Wilkins v. Fry*, 1 Meriv. 244, 263, 264, &c.

(2) Sir L. Kenyon M. R. seems to have agreed with Lord Thurlow in the principal case against decreeing specific performance of covenants to rebuild, contrary to Lord Hardwicke's opinion, in the *City of London v. Nash*, 1 Ves. 12, & 3 Atk. 512, and the prior case of *Allen v. Harding*, 2 Eq. Ca. Ab. 17; Vide in *Errington v. Aynesley*, ante, 2 vol. 342; and vide 8 Ves. 161, 162, 163. See, however, contra, *Moseley v. Virgin*, 3 Ves. 184.

Lord CHANCELLOR thought there could not be a decree to rebuild, (2) (a) as he could no more undertake the conduct of a rebuilding than of a repair, (b) and that the defendant could not take the estate as a security, without taking the burden that was upon it, which, having once taken, he could not abandon. (c) That being, at present, only an assignee in equity, no action could be brought, and that the only relief he could give the plaintiff, as he could not give him damages, was to put him in a situation to recover them. He therefore decreed that the defendants should take an assignment of the lease, and execute a counterpart, and that he must pay the costs.

(2) Vide, however, the preceding note.

(a) See *Errington v. Aynesly*, 2 Bro. C. C. 343, and notes; *Sears v. Boston*, 16 Pick. 357; 2 Story, Eq. Jur. ch. 18, § 726.

The point seems, however, not to be regarded as fully settled in 2 Story, Eq. Jur. ch. 18, § 727, 728; *Rayner v. Stone*, 2 Eden, 128, and the notes. See also *London v. Nash*, 3 Atk. 515; S. C. 1 Ves. 12; *Allen v. Harding*, 2 Eq. Ab. 17; *Moseley v. Virgin*, 3 Ves. 184; *Wright v. Bell*, 1 Daniel, 101; *Eden on Injunct.* (2d ed.) 48, and notes.

(b) See 2 Story, Eq. Jur. ch. 18, § 725; *Rayner v. Stone*, 2 Eden, 128, and notes.

(c) See *Atty. Genl. v. Christ's Hospital*, ante, 165, and note.

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*HARE v. SHEARWOOD and Others.

[S. C. 1 Ves. jun. 241.]

(No Entry.)

Mr. J. Buller, for Lord Chancellor. Parol evidence to prove that an annuity was intended to be redeemable (no such covenant being in the deed) is inadmissible. (1)

BILL to redeem an annuity under the following circumstances;—In July, 1780, plaintiff (being of the age of twenty-six) having occasion for 300*l.*, applied to Mr. Harborne, his solicitor, to procure him the same; and he applied to William Haynes, Esq., deceased, who agreed to advance the 300*l.* to plaintiff, for the purchase of an annuity of 50*l.* for the life of plaintiff, to be secured by the joint bond of plaintiff and his father, and power of attorney to Haynes, to receive the 50*l.* out of 200*l.*, which the father paid annually to plaintiff. Mr. Harborne informed the plaintiff, that it was agreed between him, on the part of the plaintiff, and Mr. Haynes, that the plaintiff should be at liberty to pay off the annuity at any time, on giving fourteen days' previous notice, and paying the 300*l.*, and the arrears to the time. Accordingly the plaintiffs, the father and son, executed a joint bond, and the plaintiff, the son, a warrant of attorney, to enter up judgment thereon; and also a power of attorney to Haynes, to receive the 50*l.* arising out of such, his allowance. In 1784, the plaintiff Francis, the son, being in expectation of receiving a sum of money, which would have enabled him to repurchase the annuity, requested Mr. Harborne to give Mr. Haynes notice of his intention of so doing, which Mr.

(1) Vide S. P. *Lord Irnham v. Child*, ante, 1 vol. 92 (and the Editor's note); *Lord Portmore v. Morris*, 2 vol. 219, &c. And see the subsequent proceedings, at law, in the principal case to the same effect; *Haynes v. Hare*, 1 H. Black. 659; See also *Poole v. Carbanes*, 8 T. R. 323. It is to be observed, that this and all other cases in these reports, under the Annuity Act, must be considered as referable to the act of the 17 Geo. 3, c. 26, only. By the late act, 53 Geo. 3, c. 141, the provisions made by the first-mentioned act have been repealed, and other provisions substituted in lieu thereof. In all cases, therefore, subsequent to the above act of the 53 Geo. 3, reference must be to that act alone.

Harborne did, and Haynes acquiesced therein; but, before the money was paid, he died, having duly published his will, and appointed the defendants his executors. Application being afterwards made to the executors, and tender made to one of them of the 300*l.*, and the arrears of the annuity then due, acceptance of the same was refused; on which this bill was filed.

The defendants, by their answers, admitted the facts, but said, they could not set forth whether there was any agreement for the redemption of the annuity; and that, being strangers to the terms on which the annuity was granted, and acting merely as executors under the will of Haynes, by which the said annuity was particularly disposed of among his children and grandchildren, they were advised it would be improper to permit the plaintiff to redeem without being properly indemnified, and therefore refused so to do, and submitted the plaintiff's right to *redeem; and said, that in case the Court thought he had such [*169] right, they were willing to act as the Court should direct.

The cause came on to be heard before Mr. Justice Buller, sitting for Lord Chancellor.

Mr. *Solicitor-General* stated the case; and

Mr. Justice Buller asking, why they did not proceed at law,

Mr. *Solicitor-General* observed, that the court of law having a jurisdiction, did not affect the jurisdiction of this Court; and proposed to read Mr. Harborne's evidence as to the agreement that the annuity should be liable to redemption.

Mr. *Mansfield*, and Mr. *Stanley*, objected to the evidence being read, as being an attempt to read parol evidence, in contradiction to the bond which contained no provision for redemption, and cited Lord *Irnham v. Child* (ante, vol. i. p. 92).

Mr. *Solicitor-General*. That case is distinguishable from the present; there the persons against whom the redemption was sought denied the agreement. Parol evidence has never been admitted where the agreement in writing is the only agreement acknowledged: but where a further agreement is stated, and not denied, or where it is left doubtful, whether such agreement subsisted or not, it leaves it open to the party to introduce evidence of the agreement.

Mr. *Mansfield*, in reply, argued, that this distinction would apply to the admission in all cases, as, if the agreement was admitted, there could be no need of proof. Here it was necessary to prove it, the executors only saying they know nothing of the matter; and there being a necessity of proof, the plaintiff must prove it by such means as are consistent with the rules of law, which this evidence is not.

Mr. Justice Buller. (2) This is an attempt to introduce a very ingenious distinction with respect to the case cited, but which does not apply to it: it is only where the agreement is admitted that relief can be given. (2) (a) The question here is, whether it is *necessary to [*170] prove the agreement; if necessary to prove it, the plaintiff must prove it according to the rules of law, which he has not done. I wonder he did not go into a court of law, if he could prove the agreement, which he might have done at a much less expense. If, in a court of law, he can

(2) See Lord Eldon C.'s observations in *M. Townshend v. Stangroove*, 6 Ves. 333.

(a) But see *Gillespie v. Moon*, 2 John. Ch. 585. See also 2 Story, Eq. Jur. ch. 18, § 770, 770 a; 1 Sugden, Vend. & Purch. (6th Am. ed.) 197, 188, 189 [259].

establish this agreement by evidence against the rule of law, he may make it available. (3) (b)

Bill dismissed.

(3) The party did accordingly try the question in the Court of C. P., but failed, on the same grounds. Vide 1 H. Bl. 659, &c.

(b) See Lord Irnham v. Child, 1 Bro. C. C. 92, and cases cited in the notes; Lord Portmore v. Morris, 2 Bro. C. C. 219, &c. and cases cited; 1 Sugden, Vend. & Purch. (6th Am. ed.) 195, 196, [267,] [268.]

MARSTON v. GOWAN. [10th Nov.]

(Reg. Lib. 1790. B. fol. 111.)

A surrender shall be supplied for a limited interest (a wife for life), though the devisees over (nephews and nieces) are not entitled to have it supplied for them.

JOSEPH WHITEHEAD, by will, 7th June, 1782, gave and devised to defendant Gowan and others, whom he appointed executors, copyhold estate in the parish of Shipton, in the county of York (which he intended to surrender to the use of his will), to permit his mother (who was since dead) to take the rents, &c. for life, towards raising 20*l.* annuity, which he was bound to pay her by bond, then in trust, to sell and pay his four sisters 50*l.* each, which he was engaged to pay them by the said bond (being the purchase of the copyhold estate from the mother), the surplus of the purchase-money to be to the same uses as the residue of his personal estate; which uses were, that the same be sold, and, out of the purchase-money, certain sums to be paid to the children of his sisters at twenty-one; and, as to the residue, to lay out the same in stock, to raise a certain sum for his mother for life, and to pay the remainder of the interest and dividends; and, after the death of his mother, the whole interest to his wife for life, for her sole use and benefit; and, after her decease, to pay and assign the principal to the children of his sisters, in equal proportions, with further provisions as to such children.

The testator Whitehead died without revoking the will, and without surrendering the copyhold estate, which descended to his sisters as the customary heirs.

And it becoming a question, whether there could be a partial supply of a surrender in favor of the wife, the children of the sisters, who were to take a remainder in the price to be obtained for the same, not being entitled to have such surrender supplied for them,

[*171] *Lord CHANCELLOR said, he did not see why a surrender should not be supplied for a limited interest, as well as a general one: (1) he therefore ordered the copyhold to be sold, the wife to have the interest of the purchase-money, for life, then to result to the customary heirs.

(1) So in the case of creditors a surrender will be supplied so far only as is necessary to satisfy the debts. Mr. Cox's note (2) to the fifth ed. 3 P. W. 98. Et vide per Mr. J. Buller, in *Compton v. Collinson*, ante, 2 vol. [*386]; *Hellier v. Tarrant*, S. P.; Serj. Inn Hall, 30th July, 1791, MSS. { *Lindopp v. Eborall*, post, 188; *Chapman v. Gibson*, post, 229. }

ATTORNEY-GENERAL v. THE MAYOR, &c. of the City of LONDON.

[S. C. 1 Ves. jun. 243.]

(Reg. Lib. 1790. A. fol. 129.)

A trust for the advancement of Christianity among infidels in America, wanting objects (from there being no infidels within the limits intended), must be appointed *de novo*. The college of William and Mary, in Virginia, who had been appointed administrators of certain charities, being now subject to a foreign power (the Independent States of America), a new scheme must be laid before the Court for the administration of the charity. (1)

An information and bill, instituted and filed by the *Attorney-General*, at the relation of the Lord Bishop of London, and by the bishop, stating that the Honorable Robert Boyle, by his last will and testament, of 18th July, 1691, and a codicil to the same, of December in the same year, directed that the residue of his personal estate, after payment of debts and legacies, should be disposed of by his executors for such charitable and pious uses as they in their discretion should think fit, but recommended to them to lay out the greater part thereof for the advancement of the Christian religion, and appointed the Right Honorable Richard Earl of Burlington, Sir Henry Ashhurst, and John Warr, executors of his said will, who after his death proved the same. The executors afterwards agreed to lay out 5400*l.*, which was considered by them as the principal part of the testator's personal estate, in the purchase of the manor of Brafferton, in the county of York, and the lands therein contained, then the property of Sir Samuel Gerrard, with a view to settling the estate in such manner that the income thereof might be forever applied to the advancement of the Christian religion, in the method following (viz.) to grant out of the said manor, a perpetual rent charge of 90*l.* per annum, to the corporation for propagating the Gospel in New England and the parts adjacent in America, to be applied by that company as follows: (viz.) 45*l.* per annum. for the salary of two ministers, to instruct the natives in or near His Majesty's colonies in New England, in the Christian religion, and to transmit the other 45*l.* per annum to the President and Fellows of Harvard College, in New England, and their successors, to be by them employed in the salary of two other ministers, to teach the natives in or near the college there the Christian religion, and subject to the said 90*l.*

*per annum, to convey the said manor, &c. to the Mayor, &c. of [*172] London, and their successors, on trust, that the surplus rents and profits (after incidental charges) should be laid out for the advancement of the Christian religion in Virginia, in such manner as the Earl of Burlington and Bishop of London (for the time being) should under their hands and seals appoint, so as such appointment should be made on or before Lady-day, 1697, and should be confirmed by a decree of the Court of Chancery. There being some delay in completing the intended purchase, the then Attorney-General and the executor of Sir Samuel Gerrard, filed an information and bill in this Court, against the executors of Mr. Boyle, for a completion of the purchase, and establishment of the charity: which cause came on to be heard the 1st August, 1695, when it was referred to the Master to make certain inquiries; and the cause coming on again, upon the Master's report, on the eighth day of said month, a decree was made for the completion of the purchase, and for the before-men-

(1) See *Moggridge v. Thackwell*, postea, 517, &c.; 7 Ves. 36, &c. Affirmed, Dom. Proc. 12 Ves. 416.

tioned method of disposing of the charity, with this addition, that an account of the said 90*l.* per annum should, after the death of the Earl of Burlington and Sir Henry Ashhurst, be sent to the President of Trinity College, Oxford, of which said Robert Boyle had been a member, as well as to the heirs of the said Earl, and Sir Henry Ashhurst, and it was ordered, that, after the purchase made upon trust, the surplus rents, after the 90*l.* and incident expenses, should be laid out for the advancement and propagation of the Christian religion among the infidels in Virginia, in such manner, and subject to such regulations, as Lord Burlington and the Bishop of London, for the time being, should appoint, so as the same should be made before 25th March, 1697, and be confirmed by this Court, and the executors should convey the manor to the city of London, upon the trusts aforesaid; which grant and conveyance were afterwards made, and the said Earl of Burlington and the then Lord Bishop of London (according to their reserved power) by an instrument in writing of the 21st December, 1697, appointed certain rules, as to the application of the charity of Virginia; amongst the principal of which were, 1st, that the rents and profits of the manor (after the deduction of the 90*l.* a year, and other expenses) should be paid by the receiver, Michajah Perry, then of London, merchant, and agent for the President, &c. of the College of William and Mary, in Virginia, and to the future agent in England [*173] for the *said College, for the time being, for the purposes therein after mentioned; 2dly, that all sums so received should be remitted to the said President, &c. for the time being; 3d, that the President, &c. and their successors, should thereout expend so much as should be necessary towards fitting and furnishing rooms for such Indian children as should be brought to the said College; 4th, that they should keep, at the College, so many Indian children in washing, lodging, books, education, &c., till they should be ready to receive orders and to be sent to preach and convert the Indians, at the rate of 14*l.* for each child, as the yearly income of the estate would amount to; 5th, that the care, instruction, &c. of the children should be left to the President and Masters of the College, but subject to the visitation of the Rector and Governor of the said College; 6th, that the President, &c. should once every year transmit an account of their receipts and disbursements, to the Earl of Burlington and Lord Bishop of London, with the number and names of the Indian children, and their progress and proficiency in their studies; 7th, that the laying out the money, &c. should be subject to such future rules as should be transmitted to the said President, &c. by the Earl of Burlington and Bishop of London, or in default thereof, by the Rector and Governor of the said College; 8th, that the charity should be called "The Charity of the Honorable Robert Boyle, Esq., of London, deceased." By a subsequent decree of this Court, pronounced 9th June, 1698, the said rules were ratified, with these variations, that the yearly account ordered by the 6th rule, to be transmitted to the Earl of Burlington and Bishop of London, should be by them transmitted to this Court, to be filed by the Register thereof; and with respect to the 7th rule, that such subsequent rules made by virtue thereof, should be first confirmed and approved by the Court; and it was ordered that the said Michajah Perry should be the first receiver, and should appoint a receiver under him. And the information further stated, that since the said decree, some merchant in London hath acted as agent of the College of William and Mary, in Virginia, for the purposes of the charity, and hath employed some person near the premises to receive the rents and profits, and transmit the same to the

agent in London (which have amounted to 300*l.* per annum and upwards), who hath, till of late years, paid the rent-charge of 90*l.* per annum to the corporation for propagating the Gospel, and remitted the surplus to the College of William and Mary for the purposes of *the charity, [*174] and that there being, in the year 1771, a considerable quantity of timber and other trees growing on the premises, fit to cut, an information was exhibited in this Court in 1772, in the name of the Attorney-General, at the relation of the College, and their then agent Osgood Hanbury, against The Corporation of London as trustees, and against the then Lord Bishop of London, as having the sole right to form regulations, &c. for the charity (the title of Earl of Burlington being then extinct), and against the Corporation for propagating the Gospel, praying that the timber might be cut down, and to have a scheme laid before the Court, for the application of the money, for the advancement of the charity, which came on to be heard, in 1773, before the Lord Chancellor, who referred it to the Master, to inquire what timber, &c. was proper to be cut, and that the same should be sold and cut, under the inspection of a person to be appointed by him, and the money to be produced by the sale should be paid into the Bank, with the privy of the Accountant-General, to the credit of the cause, and that the relators and Bishop of London should lay a scheme before the Master for the application of the money: that the timber was afterwards sold and cut, under the terms mentioned, and produced the sums mentioned: that the then Lord Bishop of London dying, and Doctor Lowth being appointed Bishop, a supplemental information was exhibited. The information stated that the sums so received and laid out, by accumulations of interest, now amount to 13,849*l.* 2*s.* 10*d.* 3 per cent. consols.; no direction having been given by the Court as to the application thereof. And the information further stated, that on the death of Doctor Robert Lowth, in 1787, the present relator Beilby was appointed Lord Bishop of London, and (as the title of Earl of Burlington is extinct) is the only person entitled to form, alter, and vary regulations, &c. for the management of the said charity, subject to the approbation of this Court: but no supplemental information or bill hath been filed for carrying on the said decree, and that he therefore is entitled to the benefit of the decree of 1773. And the information further proceeded to state, that Osgood Hanbury continued to act as agent in London, for the College of William and Mary, till the time of his death, in 1784, after which John Lloyd of the city of London was appointed, and still continues agent, and that John Clough, of the city of York, gent., now is and has long been receiver; but although the said John Clough has remitted *several sums, on account of the rents, to the said Osgood Han- [*175] bury, in his lifetime, and since, to the said John Lloyd, yet a large sum remains in his hands; and although Osgood Hanbury paid the 90*l.* per annum, to the corporation for propagating the Gospel, to Lady-day, 1782, he from that time ceased so to do; and although he for some years remitted the surplus rents to the College of William and Mary, he had for some years forborne so to do, and that the said John Lloyd had never paid any sums either to the said Corporation or to the College. The information then stated, that in 1775 the provinces of New England and Virginia fell into a state of rebellion against the King of Great Britain, in that state till 1783, when they (with eleven other provinces in America, which were lately under His Majesty's dominion) were declared to be States independent of His Majesty and this kingdom, and they have still continued, and are so, and therefore that all the inhabitants of such

States are to all intents and purposes foreigners and aliens as to this kingdom, and therefore no further part of the rents and profits of the said manor or estates ought to be paid either to the said Corporation for propagating the Gospel in New England, or to the said President, &c. of the said College of William and Mary, for the charitable purposes aforesaid, or either of them, or any other person whatsoever; but that the money now due from the executors of Osgood Hanbury, or from John Lloyd and John Clough, in respect to the said rents and profits, ought to be applied in some other manner in this kingdom, or in some part of His Majesty's dominions, for the advancement of the Christian religion, and the future rents applied for like purposes; and that the sum of 13,849*l.* 2*s.* 10*d.* in the 3 per cent. consols. bank annuities, should be invested in lands, and the rents and profits thereof, and the intermediate dividends, should be applied to the like purposes. The bill therefore prayed to have the benefit of the suit in 1773, and of the decree therein, and for further directions, and that the money in the funds might be laid out in the purchase of lands, the rents and profits whereof, and of the manor, &c., and intermediate dividends, to be laid out for the advantage of the Christian religion in England, and prayed accounts against the executors of Hanbury, and against Lloyd and Clough, and that they might be restrained from paying any more money to the College of William and Mary, or to the corporation for propagating the Gospel in New England, and to have a new receiver appointed.

[*176] *The President, &c. of the College of William and Mary, in Virginia, by their answer, state their charter from King William and Queen Mary, and insist, notwithstanding the circumstances, that they are entitled to the rents and profits of the estate. They further stated, that they had been at expenses upon the credit of the sums to be remitted to them, and claimed as creditors for the same.

Harvard College did not appear, and the others were principally formal defendants.

Upon the cause coming on to be heard,—

Mr. *Attorney-General*, and Mr. *Ainge*, on the part of the information,—

The first question is, whether a new scheme ought not to be laid before the Court. The situation of things is much changed since the mode of application was settled by the executors; the circumstances of the colonies are now such, that the Court cannot look to the application of any moneys which may be paid to the College—it cannot see that the money shall be applied to the objects for which it was intended by the testator. The College state their claim as servants of the Court, they state that they had a charter from King William and Queen Mary; but whatever their former situation was, they cannot now be considered as a corporation; a corporation is the creature of the Great Seal, and as such they have ceased to be a corporation. They claim as trustees; but cannot be considered as such, when the money paid to them would be out of the control of the Court. As to the annuity payable to the corporation for propagating the Gospel in New England, they have applied the charity to countries adjacent to New England, and are still within the original decree. With respect to the other 45*l.* to Harvard College, they are precisely in the same situation as William and Mary College. It has now, therefore, become a case of discretion in that Court as to the administration of the charity. As to the receiver, he has made up his accounts, and paid the balance into Court, except about 300*l.*, which had been remitted before notice was given him not to do so in future.

Mr. *Mansfield*, and Mr. *Mitford*, for William and Mary College.

*The College are merely servants of this Court in the administration of the charity, and as fit now for that purpose as when the charity first began. The Revolution has not rendered them less amenable to the jurisdiction of this Court than before, as they could then only be brought voluntarily before the Court. As to the existence of the College as a corporation, if that was intended to be brought into judgment, it should have been suggested in the information; but they are treated throughout as a subsisting college, and appear under their seal. Their claim, as such, is preserved by the treaty of peace, by which every right of every corporation is left as it was before, the treaty of peace only recognizing the independence of the government. Even in conquered countries, the situation of permanent bodies remains the same as it was, till altered by the conquering power: thus after the conquest of the English provinces in France, there were several convents in them that had lands in England, and though the convents became subject to the kings of France, their English lands, although during time of war they were seized into the King's hands, yet in time of peace the convents enjoyed the rents, till the time of Henry the Fifth, when the lands were taken into the King's hands. If the trusts do not subsist, the lands would escheat to the crown. In the present case, the College states that a considerable sum is due for money expended in supporting the children, whilst the agents withheld the profits. If they are not to be intrusted with the future administration, they should be admitted as creditors for these sums, but there is no reason why they should not be intrusted as before.

LORD CHANCELLOR, during the argument, said he could not see how the Bishop's bill was to be sustained; he is only a trustee as to the mode of administration of the charity, and has not therefore any interest to sustain a bill. With respect to the College, suppose they should misbehave, where is the *scire facias* to be brought? Suppose a conquest *in regem*, the law would be the same, but the *scire facias* could never be brought in the court of the conquered King.

After the argument, he said that the trusts to the corporation, to convert neighboring infidels, ceasing for want of objects (there being now no neighboring infidels), the charity must be applied **de novo*. As [*178] to other parties, he could not now consider them as corporations: therefore the Master must propose a plan for the application of the produce of the estates, according to the intentions of the testator, Mr. Boyle. (a)

Mr. *Mansfield* pressed for the costs of the College to be paid.

LORD CHANCELLOR said, he was desirous to do it, but he did not know by what name to give them the costs. (2) He, after consideration, ordered these costs to be paid to their agents.

(2) The order was generally after some previous provisions, that "all other parties in the cause should be paid their costs." — R. L.

(a) See 2 Story, Eq. Jur. ch. 32, § 1184, 1185; *Campbell v. Radnor*, 1 Bro. C. C. 272, note (a), and cases there cited; *Oliphant v. Hendrie*, 1 Bro. C. C. 571; *Bartlet v. King*, 12 Mass. 537.

As to the doctrine of *cy pres*, see *Moggridge v. Thackwell*, post, 517; *White v. White*, 1 Bro. C. C. 15, and cases cited in the notes; *Atty. Genl. v. Chester*, 1 Bro. C. C. 444, and note at the end of the case, and the authorities there cited and referred to; 2 Story, Eq. Jur. ch. 32, § 1169, § 1170, § 1170 a, and notes.

DAVIES v. AUSTEN and Others. [Vide S. C. 1 Ves. jun. 247.]

(No Entry.)

Executors cannot justify paying a legacy payable at twenty-one, to the infant, or for his use, except for express necessities. (1)

JOHN RICHARDSON, Esq., by will, dated 8th December, 1770, gave all his personal estate to trustees, in trust, among other legacies, to pay to William Horatio Green (an infant), by the description of Master William Horatio Green, son of Richard Green, Esq., 500*l.*, and directed that such of his legatees as might be infants at the time of his decease, should receive interest at the rate of 5*l.* per cent. till their respective legacies should be paid, which he desired might be to the boys at the age of twenty-one years, &c., and appointed the defendant, his daughter, Dame Ann Austen and others, executors, and died without revoking his will.

In the year 1780, the legatee, William Horatio Green, went to the East Indies, being then still an infant, and soon after his attaining his age of twenty-one years, sold his legacy of 500*l.* under the will of his grandfather Richardson, to the plaintiff, for 5000 rupees, being equal in value to 625*l.* sterling, and made an assignment and letter of attorney for the receipt of the same, from the executors, who refusing to pay the same, for the reasons in the answer stated, the present bill was filed.

The defendants stated, in their answer, that Richard Green, the father of the legatee, William Horatio Green, having died intestate, and Martha Green, his mother, having given up her own jointure and provision for the benefit of her husband's creditors, the legatee, William Horatio [*179] Green, had no other provision than *the legacy of 500*l.* and an equal share with a brother and sister, in 670*l.* 3*l.* per cent. annuities, upon the death of his mother; who having married the reverend Thomas Jones, he had, before the year 1780, expended in clothes, schooling, &c. for the legatee, the sum of 150*l.* and did afterwards, with the approbation of the executrix, place the legatee with the captain of an English vessel trading to America, and afterwards the legatee taking a dislike to that way of life, he gave the captain a sum of money to release his engagement, amounting together to a sum exceeding 100*l.* That afterwards the legatee, having shown an inclination to a military life, Mr. Jones, with the approbation of the executrix, placed him at Mr. Lochee's military academy, and paid for expenses there the sum of 100*l.*; and an opportunity having offered of sending the legatee, with advantage, in the service of the Company to India, he fitted him out for India, and in the expenses of sending and paying for his passage, and also providing him with money for his immediate expenses there, 200*l.* were expended; in the whole, amounting to 650*l.*, which the executors conceived were necessarily and properly laid out for his maintenance and advancement, and in consequence whereof he had given a receipt to Mr. Jones, for the sum of 500*l.* and had, before he sailed for India, made a will, whereby he had given the said sum of 500*l.* to him: they also further stated that the interest had been paid to the legatee's mother whilst she continued unmarried, for his maintenance, and afterwards to her husband, the said Thomas Jones.

Mr. *Solicitor-General*, for the plaintiffs, insisted that in this case the Court could make no allowance for the sums beyond the interest expended

(1) See *Lee v. Brown*, 4 Ves. 362, &c., and the Editor's notes to *Cooper v. Thornton*, ante, 96, &c., postea, 136, &c. Vide etiam, 1 Ball & Beatt. 407.

in the maintenance or provision for the legatee, even if he were now suing for the legacy; much less against an innocent assignee, who, it appeared, had paid a full price for the assignment of this legacy.

Mr. Attorney-General, and Mr. Sutton, for the defendants the executors, argued, that these were sums of money paid for necessary expenses, and for his provision in the line of life in which he stood; that, in some cases, executors had been held justified in paying legacies to infants themselves, as in *Philips v. Paget*, 2 Atk. 80, and that money laid out in a child's education, has been allowed out of the principal of a legacy (*Barlow v. Grant*), *1 Vern. 255, and was considered as most advantageous and beneficial to the infant; that if a person lends money to an infant, which is paid by him for necessities, the person lending shall stand in the place of the creditor; and that, as in this case, the second husband of the mother was not bound to provide for him, the executors supplying his wants, stand in the place of any other person who might supply him with necessities; and as the plaintiff is only an equitable assignee, he can only be entitled to stand in the same situation with the infant himself, and is consequently liable to those demands to which the infant himself is liable. *Marlow v. Pitfield*, 1 Wms. 558.

Lord CHANCELLOR said, the plaintiff did not argue the case higher than if it was the infant himself who sued. Every one who takes an assignment of a *chose in action*, gives credit to the assignor, that there is no lien upon it. (a)

But in this case his Lordship was not satisfied that it was for necessities: in particular, he thought the 100*l.* to the American trader was too much. (b)

He therefore decreed the legacy to be paid, with interest, from the legatee attaining his age of twenty one. (c)

(a) See the doctrine and cases cited upon this point of the liability of an assignee of a chose in action to the equities to which it was subject in the hands of the assignor, in note (a) to *Cator v. Burke*, 1 Bro. C. C. 434, 436; *Coles v. Jones*, 2 Vern. 692, Raithby's note; *Turton v. Benson*, ib. 764; *Hill v. Caillovel*, 1 Ves. 122; *Willis v. Twambly*, 13 Mass. 206; *Webster v. Wise*, 1 Paige, 319; *Chamberlain v. Gorham*, 20 John. 144; *Greene v. Darling*, 5 Mason, 215; *White v. Prentiss*, 3 Monro. 510; *Murray v. Lylburn*, 2 John. Ch. 441; *Sharp v. Eccles*, 5 Monro. 72; *Kennedy v. Woolfolk*, 3 Hayw. 199; *Porter v. Breckenridge*, *Hardin*, 21; *Brashear v. West*, 7 Peters, 608; *Wheeler v. Hughes*, 1 Dall. 23; *Solomon v. Kimmel*, 5 Binn. 232; *Bury v. Hartman*, 4 Serg. & Rawle, 177; 1 Metcalf & Perkins's Dig. Tit. Assignment, art. 3, pl. 109, et seq., art. 6, pl. 234, et seq.; 3 Sugden, Vend. & Purch. (6th Am. ed.) 301; 303, [431], [433], and cases cited in the notes.

(b) See 1 Macpherson on Inf. (Eng. ed. 1841) 255. See a discussion upon the subject of improperly supplying infants with articles not necessary for them, in *Eckert v. Lines*, Sup. Court. Pennsylv. Sept. Term, 1843, 6 Chand. Law Rep. 447.

(c) See *Cooper v. Thornton*, post, 186; 2 Williams, Ex. Pt. 3, Bk. 3, ch. 4, § 5, p. 863.

HILL, Bart. v. BROUGHTON, Bart. [15th Nov.]

(Reg. Lib. 1790. A. fol. 158.)

A charge was made raisable when A. or his issue should come into possession; a jointress, who had an estate for life, conveyed to trustee, in order to enable A. (who was tenant in tail in remainder) to suffer a recovery, which he did. Having such an interest as enabled him to suffer a recovery, held by Lord Chancellor to be coming into possession within the terms of the deed, and to make the charge raisable.

By indentures of lease and release, of 10th and 11th August, 1727, made between Sir Thomas Delves, baronet, and Dame Rhoda, his wife,

of the first part; John Broughton, Esq., and others of the second part; and Thomas Boulby Skyrmsire, Esq., and others of the third part; the manor of Daddington was (*inter alia*) conveyed to the trustees of the second part, to the use of Sir Thomas Delves, for life, remainder to the heirs male of Sir Thomas Delves, remainder to Dame Rhoda for life, remainder to the trustees to raise 5000*l.* for Jane Broughton, an infant, grand-daughter of Sir Thomas Delves (afterwards Jane Hill, wife of Sir

Rowland Hill, and mother of the plaintiff), remainder to the [*181] *trustees of the third part for 1000 years, upon the trusts after expressed, remainder to Sir Brian Broughton, baronet, since deceased, brother to said Jane Broughton, remainder to the trustees of the third part, to preserve contingent remainders, remainder to the first and other sons of Sir Brian Broughton in tail male; and the said indenture contained a proviso that whensoever Sir Brian Broughton, or any issue of his body, according to the limitations aforesaid, shall come to and be seised of the present and immediate use, and estate of freehold in possession, of and in the said manor of Daddington, expectant on the said term of 1000 years, herein limited to the said trustees (of the third part) and the said Jane Broughton, or any issue of her body shall be then living, then the said manor, &c. should stand charged with the further sum of 5000*l.*, to be paid unto the said Jane Broughton, or such her issue, within two years after the said Sir Brian Broughton, or his issue, should come to and be in possession of said manors, &c., and the said term of 1000 years was limited to the said trustees (of the third part) for the purpose of securing the same; but the said 5000*l.* was not to be raised during the life of Dame Rhoda Delves.

Sir Thomas Delves died 4th September, 1727, without leaving issue by Dame Rhoda, by which all the limitations previous to that to the trustees (of the second part) became determined, except the life estate of Dame Rhoda Delves, by which the trustees (of the second part) were empowered to raise the first sum of 5000*l.* for Jane Broughton. The said 5000*l.* was accordingly raised, and paid under a decree of the Court; and the same was settled on the marriage of the said Jane Broughton with Sir Rowland Hill; in which settlement was also a provision, that the further sum of 5000*l.*, if it should become due, should also be applied to uses therein declared.

A new settlement of the estate was afterwards made in 1743, under which a like term of 1000 years was limited to the trustees of the third part in the former settlements, remainder (subject to Dame Rhoda's life estate) to Sir Brian Broughton for life, *sans* waste; remainder to trustees to preserve contingent remainders; remainder to Brian Broughton (afterwards Sir Brian Broughton Delves), then only son of Sir Brian Broughton, in tail; remainder to the second and other sons of the first Sir [*182] Brian Broughton, *in tail, with remainder over: and the uses of the 1000 years' term, were declared to be as before.

Sir Brian Broughton died 11th August, 1744, in the lifetime of Dame Rhoda, leaving two sons, viz. Brian Broughton (afterwards Sir Brian Broughton Delves) and Thomas Delves, now Sir Thomas Broughton, Bart. (a defendant).

Sir Brian Broughton Delves, upon the death of his father, became tenant in tail in possession, of several of the estates comprised in the indenture of 1727 and 1743; but with respect to the manor of Daddington, &c., which was settled on Dame Rhoda for life, he became tenant in tail in remainder expectant on the determination of her estate for life, and

subject to the trust-term of 1000 years; and the said Sir Brian Broughton Delves suffered a recovery of the said estate; and in order to enable him so to do, by indenture of 27th and 28th August, 1762, Dame Rhoda conveyed her estate to Sir Rowland Hill, in trust, to convey the same to Sir Brian Broughton Delves; and Sir Rowland Hill joined in a conveyance with Sir Brian Broughton Delves, to make a tenant to the freehold.

Sir Brian Broughton Delves entered, in pursuance of the deed, and died 17th January, 1766, without issue, leaving his brother, Thomas Delves (now the defendant, Sir Thomas Broughton), his heir-at-law; and having made his will, dated 21st May, 1764, and thereby devised his estates in the county of Chester to trustees, to the use of his brother (now the defendant, Sir Thomas Broughton) for life, remainder to trustees to preserve, &c., remainder to the first and other sons of his said brother, in tail male, with remainder over.

Dame Rhoda Delves died 17th of January, 1772, and

Dame Jane Hill died 17th December, 1773, leaving Sir Rowland Hill, her husband, the plaintiff, and her eldest son, and other children, surviving her.

Sir Rowland Hill, claiming to be equitably entitled to the further sum of 5000*l.*, so provided for the said Dame Jane Hill, by indenture of 29th September, 1780, between Sir Thomas *Broughton of the [*183] one part, and Sir Rowland Hill of the other part, reciting the deaths of the several parties, and that Sir Rowland Hill, as representative of his wife, and in her right, was become entitled to the 5000*l.*, Sir Thomas Broughton made a charge of the 5000*l.* on his estates. (1)

Sir Rowland Hill died 7th August, 1783, having made his will, and a codicil thereto, and thereby declared that the provisions he had made for his younger children were in satisfaction for their portions under his marriage-settlement, he gave the residue of his personal estate to the plaintiff, and made him executor, by which plaintiff became entitled to the 5000*l.*

Sir Thomas Broughton has issue Delves Broughton, his eldest son, who, as first son of the body of Sir Thomas Broughton, was tenant in tail, under the will of Sir Brian Broughton Delves; and Sir Thomas Broughton, and Delves Broughton, have suffered a recovery of the estates to themselves in fee simple.

The term of 1000 years has vested in the defendant, John Hill.

The plaintiff applied for payment of the 5000*l.*, and Sir Thomas Broughton, having refused to pay the same, the present bill was filed, praying that that sum might be raised from the estate charged therewith, and paid to the plaintiff.

The defendants, Sir Thomas Broughton and Delves Broughton, by their answer, said, that the security executed by Sir Thomas to Sir Rowland Hill, for the 5000*l.*, was executed under a mistake, and, therefore, ought not to bind the estates, unless the same were chargeable therewith under the indenture of the 11th April, 1727; and insisted that, under the circumstances of the case, the said sum was not now to be raised by virtue of the clauses in the indenture of release of 11th April, 1727.

The question was, whether the event that had happened, upon which the

(1) "With interest, at 4*l.* 10*s.* per cent. per annum." — R. L. See the decree accordingly, *postea*, note (3).

sum was to be raised; i. e. whether Sir Brian Broughton, or any issue of his body, had come to and been seised of the present and immediate use, and estate of freehold, in possession, in the manor of Daddington, according to the limitations in that deed; the plaintiff contending [*184] that the event had happened, the *defendant, that it had not; and that Sir Brian Broughton Delves did not come into possession under the limitations of the deed, but that the recovery, having been suffered in the lifetime of Dame Rhoda, Sir Brian Broughton Delves became seised of the estates in fee simple in remainder, after the estate for life of Dame Rhoda; and that he, Sir Thomas, did not, at her death, become seised under the indentures of 1727, or 1743, but by virtue of the recovery suffered by Sir Brian Broughton Delves, and his will.

Mr. *Attorney-General*, for the plaintiffs, contended, that, in this case, Sir Brian Broughton had come into possession of this estate, within the intent and meaning of the deed: that it is not universally true that a person who suffers a recovery obtains a new estate; that here he derived his power of suffering the recovery from the estate tail, and therefore the coming to the estate-tail was sufficient to make him liable under the deed.

There is a case, 1 Wils. 66 (*Martin on the demise of Tregonwell v. Strachan*), (2) which shows that a person who suffers a recovery shall not always be considered (2) as taking a new estate, but that the estate shall go to the old uses: in that case a distinction was taken between an estate by descent, and one by purchase. In the present case, the act done is the act of the remainder-man, who would, by his own act, destroy the charge. Courts of equity have gone a great way in cases of this kind. Where an infant has a term, and the fee descends, and the infant disposes of the term, it is not considered as a merger of the term. *Powel v. Morgan*, 2 Vernon, 90; *Thomas v. Keymish*, S. B. 348. (a) So with respect to the interpretation, as to coming in under certain persons or limitations. If there be an intimate connection between the acts, it is held to be a coming in under the limitation, Douglas, 733. So, within the meaning of this proviso, a person who took an estate tail, and thence acquired the ability of gaining the fee, must be held to have come in under the limitations.

Mr. *Solicitor-General*, and Mr. *Campbell*, for the defendants.

In the present case, Sir Thomas Broughton is reduced to the state of a mere tenant for life. The estate derived under the recovery is as much a new estate, as if the recovery had been made to a purchaser in [*185] fee, who had afterwards devised to Sir *Thomas Broughton for life—Lady Hill was only to have the 5000*l.* in particular events; if the Broughton family did not come into the immediate use and possession of the estate she was not to take; it was only upon the event of their coming into such immediate use and estate of freehold in possession, that the lands were to be charged with the further sum of 5000*l.* If Lady Rhoda had surrendered her life estate, Sir Brian Broughton would have been in possession, and then the charge of 5000*l.* would have taken place;

(2) Mr. Brown must have misconceived the course of the argument here; for the cited case of *Martin v. Strachan*, forms a precise exception to the proposition which Mr. Brown's report supposes it to establish. Vide *Cruise's Digest*, 3 vol. 364, 5 vol. 500, et seq. See the case of *Martin v. Strachan* well stated, 5 T. R. 157, n. Et vide S. C. Willis's Rep. 444, and Mr. Nolan's edition of *Strange's Rep.* 2 vol. 1179, note. The judgment of the Court of K. B. was affirmed in *Dom. Proc.* Vide 6 Bro. P. C. 319, &c. (octavo edition.)

(a) See the cases on this subject in *Lord Compton v. Oxenden*, 4 Bro. C. C. 403.

but Lady Rhoda conveyed her estate in such a way as not to bring forward Sir Brian Broughton's estate. If the uses of the recovery had been to a purchaser, the case provided for could certainly not have been held to have arisen, because it would not have been within the limitation. Then why should not the power of the parties be as great to bar Lady Hill's claim on the estate, as the subsequent limitations after the estate tail? Then the question is, whether this has not been done, by having reduced Sir Thomas Broughton to a mere tenant for life. According to the words, Sir Brian Broughton or his issue were not only to be seised of the estate, but were to come to the possession, and to be in possession of the immediate use, and the money was to be raised within two years after. If a power of jointuring had been given to Sir Brian Broughton in these words, the recovery would have barred it. Dame Rhoda's conveyance to Sir Rowland Hill kept her estate alive. If the settlor had meant the charge to take place if Sir Brian Broughton came to it *quocunque modo*, it would have been easily done, so as to answer that intention; but he looked to Dame Rhoda's estate being spent.

Lord CHANCELLOR, during the argument, and at the close of it, spoke to the following effect:—The question is, whether he did not come into possession within the limitations: the uses of the recovery springing from his estate, can he take them, and qualify himself as not being in possession; if the estate was entirely gone by the concurrence of the party, I think the charge would accrue. The question is, whether a stranger can be deprived of the bounty of the settlor, by the act of the tenant for life, and tenant in tail. The case from Douglas goes upon much larger words. The charge here would be raisable during Lady Rhoda's life, or within two years. The only question is, whether a person who conveys an estate is not to be considered as in possession. If there had been a forfeiture or a surrender, the tenant in tail would *have come [*186] into possession; his coming in by fine and recovery is the same thing: the tenant for life and the tenant in tail joining makes no difference.

The charge must be raised, with interest, at 4*l.* (3) per cent. from two years after the death of Lady Rhoda.

(3) "At 4*l.* 10*s.* per cent. per annum, according to the terms of the deed of the 29th of Sept. 1780."—R. L.

COOPER v. THORNTON. [Vide S. C. antea, 96, 99.]

(Reg. Lib. 1790. A. fol. 16.)

A legacy given to "A., to be divided between himself and his family," the executor pays the legacy to A., it is well paid to discharge the executor. (1)

AN appeal from the decree at the Rolls, reported ante, p. 96, where the case is stated.

Mr. *Mansfield*, Mr. *Selwyn*, and Mr. *Cooke*, for the appellant, argued, that his Honor's decree was erroneous, and that the payment to the father was a bad payment; no trust was reposed in the father by the testator,

(1) Vide the report on the former hearing, antea, 96, 99, &c. with the Editor's notes; especially *Robinson v. Tickell*, 8 Ves. 142, S. P. See also per M. R. in *Lee v. Brown*, 4 Ves. 367.

who intended his executor to divide the fund, which was more extensive in its objects than merely the father and his children. The word used is *family*, which is more extensive than children; all the children except Henrietta were adult; as to them, there cannot be a pretence that the payment to the father was good; all the cases agree that such a payment is bad. *Dagley v. Tolferry* was not the first case upon the subject, there had been a former decision, to the same purpose, in *Strickland v. Hudson*, 3 Ch. Rep. 168. The decree is rightly reported in *Dagley v. Tolferry*, it is agreeable to the Register's book. *Cunningham v. Harris*, in the Exchequer, 29th June, 1786, was as follows: Robert Harrison made his will 5th May, 1768, and bequeathed the sum of 100*l.* to the plaintiff, Maria, by the description of his nephew's daughter, Maria Harrison, and appointed Christopher Harrison and Richard Harrison executors, who are both dead, and the defendants were the executors of the survivor. The executors long since paid the legacy to the father of Maria Cunningham (the plaintiff), she being an infant at the time of the death of the testator, and the father executed a release or discharge of the legacy: the executors admitted assets in their hands sufficient to answer the legacy, if the former payment was not good, but strongly insisted upon the hardship of the case, more particularly as the plaintiff, Maria, took considerable benefit under the will of her father; to this it was answered, that the payment to the father was bad, and although the plaintiff, Maria, took benefit [*187] *under the father's will, yet his executrix had wasted the assets, and that benefit would not prove effectual, and that freehold and copyhold property, which the plaintiff Maria became entitled to upon the death of the father, did not accrue to her by his will, but by settlement. The Court expressed great reluctance in establishing the demand made by the bill for this legacy, but said, the rule was now firmly settled, that a legacy to an infant cannot be paid to the father, and they decreed that the defendants, out of the assets of the testator, in their hands, pay to the plaintiff, the legacy, with interest after the rate of 4 per cent., and the plaintiff's costs. This is a decisive judgment on the subject. In the present case, the father was insolvent, and the money seems not to have been paid, but allowed out of a debt he owed to the testator. His Honor relied on the word *himself*, but there can be nothing stronger in the word *himself* than *him*, and if it had been to be divided between him and his family, the executor must have made the division. But if the bill should have been dismissed, it should not, in so doubtful a case, have been with costs; there was ambiguity enough in the case to justify the filing of the bill.

LORD CHANCELLOR. The question is, whether the testator meant to charge the executors with payment, or he meant to discharge them upon payment to the father.

It is true, that, where the gift is generally to the children, it is a charge on the executor. (2) It is a difficulty imposed upon him to have a sum of money to pay to children.

In the present case, I can understand the testator no other way than that he meant to discharge the executors; and that it should be paid to the father, to divide it among them. (3) (a)

(2) See *Davies v. Austen*, ante, 178, &c. { 2 Macpherson on Infants (Eng. ed. 1841), 272, 273. }

(3) Vide *Robinson v. Tickell*, S. P. 8 Ves. 142.

(a) See *Cooper v. Thornton*, ante, 99, and note (a) and cases cited.

A father, as natural guardian, is not entitled to demand or receive payment of a legacy to

If it had been expressly given to him to divide it according to his discretion, the payment to him would be a good payment.

I think in this case the father might have sued for this legacy in the Ecclesiastical Court, and, according to the late determinations, (4) might have brought an action. (4)

Decree affirmed. (b)

his child. *Miles v. Boyden*, 3 Pick. 213; *Hyde v. Stone*, 7 Wend. 354; 2 Kent (5th ed.), 219, 220.

(4) *Atkins v. Hill*, and *Hawkes v. Saunders*, Cowp. 284, 289. But they were afterwards overruled, and the law is now settled to the contrary. *Deeks v. Strutt*, 5 T. R. 690. (c).

(b) See *Robinson v. Tickell*, 8 Ves. 142; *Lee v. Brown*, 4 Ves. 367.

(c) 1 Story, Eq. Jur. ch. 10, § 591, 592, 593, 594.

But an action will lie in Massachusetts to recover a legacy, either against an executor, after a demand made, *Miles v. Boyden*, 3 Pick. 213; *Farwell v. Jacobs*, 4 Mass. 634, or against a devisee or terre-tenant of lands charged with the payment of legacies, &c. *Swasey v. Little*, 7 Pick. 296; *Felch v. Taylor*, 13 Pick. 133; *Taft v. Morse*, 4 Metcalf, 523.

In New Hampshire, it is not necessary in a suit to recover a legacy charged on land, in order to maintain the action, to prove a demand for the legacy, nor a promise on the part of the defendant to pay. *Pickering v. Pickering*, 6 N. Hamp. 120.

In Connecticut it has been decided, that assumpsit or debt will lie against an executor, having assets, upon an implied promise. *Knapp v. Hanford*, 6 Conn. 170.

See also on the subject of actions for legacies, *Dewitt v. Schoonmaker*, 2 John. 243; *Beecker v. Beecker*, 7 John. 99; *Tole v. Hardy*, 6 Cowen, 333; *Van Orden v. Van Orden*, 10 John. 30; *Kelsey v. Deyo*, 3 Cowen, 133.

*LINDOPF v. EBORALL.

[*188]

(Reg. Lib. 1790. B. fol. 85.)

Copyhold estate shall not pass by general description, where there is freehold to satisfy the words, (1) though it had been supposed to be freehold, and the first devise was for payment of debts, and then given to a younger child otherwise provided for.

THOMAS EVETTS, by his will, devised, and bequeathed unto Thomas Fisher and Richard Archer, all and every his messuages, cottages, lands, tenements, hereditaments, and real estates whatsoever, situate and being within the parishes of Northend, Knightcot, and Shottery, or either of them, in the county of Warwick, and also all and every his messuages, cottages, lands, tenements, and hereditaments, situate in Sardon, Shares-hill, Pelsall, Essington, or Chislyn Hay, in the forest of Cannach, in the county of Stafford, and also all other his messuages, cottages, lands, tenements, and hereditaments, and real estate whatsoever, situate, lying, and being in the counties of Warwick and Stafford, or elsewhere within the kingdom of Great Britain, not settled in jointure upon his wife, with their and every of their appurtenances, in trust to sell and dispose of the same to pay his debts and legacies, and then gave his personal estate, in trust, to be sold for the same purposes. And the clear surplus of the produce of the real and personal estate, after debts and legacies paid, to be invested in government security, and the interest to be paid to his wife, for life, and the principal to his daughter Anne, and the issue of her body,

(1) Vide *Judd v. Pratt*, 15 Ves. 390, 394, &c.; *Church v. Mundy*, 12 Ves. 426, &c.; but more especially on the appeal before Lord Eldon, C., 15 Ves. 396, &c., which comprehends most of the material references. See particularly *Chapman v. Hart*, 1 Ves. 271, &c.; *Byas v. Byas*, 2 Ves. 164. Supplement to Vesey, 138, 315, &c., and Scriven on Copyholds, 134, 135, 136, &c. 161, 162, &c.

if she attain twenty-one, and in default, to his son Thomas Evetts, in like manner, and in default over.

The testator died, leaving Thomas his heir-at-law and customary heir (who married the defendant Mary), and Anne, the plaintiff in the revived bill, who claimed a small copyhold in Pelsall, of about 7l. a year under the will, having attained twenty-one.

The defendant Mary, the widow of Thomas Evetts, the deceased son of the testator, claimed it under a settlement made upon her marriage for her life, with a power of disposing of it, given by the settlement, in default whereof it was limited to the right heirs of her husband.

It was charged in the bill, and admitted by the answer of Mary, that in 1722, this copyhold was purchased by Thomas Evetts, the [*189] grandfather of the testator, and surrendered to him in fee, and he was duly admitted; that from him it descended upon Barlow Evetts his son and heir, who was never admitted, and from him upon Thomas, the testator, as his son and heir-at-law, and he was never admitted; that Thomas made the devise before stated, and had freehold estate situated in Pelshall. Thomas had lately discovered it was copyhold, had been admitted, and had surrendered to the uses of the settlement.

The bill prayed, that the copyhold might be decreed to pass by the will.

Mr. *Solicitor-General*, and Mr. *Simcon*, for the plaintiff. The only question is, whether this copyhold estate would pass, in equity, for the payment of debts, and for the purpose of giving it to Anne, the younger child. There is not a doubt of the testator's intention, and that he thought it was a freehold estate, and meant to pass it. And it is strictly within the rule for supplying surrenders, being for the payment of debts, and for a younger child. Notwithstanding the general rule, that copyholds shall not pass unless expressly named or described, the Court will consider them as passing where they are necessarily implied even by the words lands, tenements, and hereditaments. *Drake v. Robinson*, 1 Wms. 443; *Haslewood v. Pope*, 3 Wms. 323; *Mallabar v. Mallabar*, Ca. temp. Talb. 79.

Lord CHANCELLOR (without hearing the other side) held, that it did not pass; for although, where the copyhold is necessary to pay debts, (2) it is

(2) It appears evident that Mr. Brown reported this judgment most inaccurately from a note shown him by Mr. Cox. As Lord Eldon C. has observed, Mr. Brown's report of it is "not very intelligible," and as Mr. Cox has favored the Editor with the correct note in question, it is most satisfactory to insert it.

"The Lord Chancellor (without hearing the other side) held that it did not pass; for although, where the copyhold is necessary to pay debts, such necessity is held equivalent to a description of it (which was rather a stretch, originally), yet here it not being necessary for that purpose, it should not pass for the further purpose of going to the younger child: the Court had never extended this rule to a case where the question is, whether the wife and child shall have more or less; for it is very difficult to find sufficient evidence in such a case to amount to a declaration plain, that the testator meant the copyhold to pass." From Mr. Cox's MS. notes.

The Editor subjoins also another note of Lord Thurlow's judgment, with which he has been favored by Sir John Simcon, who was of counsel in the cause:—

"Lord Thurlow C. (without hearing the other side) decided the copyhold did not pass upon the ordinary rule, that the words were satisfied by the freehold lands in Pelshall. That it was not necessary to pass to pay debts, and that the Court had strained in that case; for that they had construed the intention at the time of making the will, by the situation of the testator's affairs and debts at his death, which might be all incurred after making his will, but that that was settled. That there was no room for straining him to give a younger child a little more than she would otherwise take, and that the heir had a right to what was not well given, from him."

The observations of Lord Eldon, above alluded to, are in *Judd v. Pratt*, 15 Ves. 394, and are as follows:—

held equivalent to a description of it, yet here it not being necessary for that purpose, it should not pass for the further purpose of going to the younger child; the Court had only held that, where the child was unprovided for, not where the question was as to the more or less of the provision, to which the intention could never be held to apply. (a)

"The case of *Byas v. Byas*, is a strong authority upon the point; which case, as I find by my own note, was relied on by Lord Thurlow, in *Lindopp v. Eborall*; holding, that the general words in that will did not pass the copyhold estate; and though the judgment, as it appears in the report of that case, is not very intelligible, it is sufficient to recall the meaning of Lord Thurlow to the minds of those who heard him. His meaning was, that where a testator intends to provide for his child, the Court cannot determine whether the provision shall be large or small, more or less; but can only say that he does intend a provision for that child. If, therefore, there is a freehold estate, that will answer the purpose of a provision, the Court has no means of ascertaining that he intended a larger provision: but where the Court regards a testator, as proposing that his debts shall be paid, the amount of the debts must ascertain the value to be applied to that purpose, and if the debts cannot be discharged by the freehold estate, the Court draws the inference, that the testator meant to provide a fund which would be sufficient to answer that, his purpose. In the one case, the parent intending to make a provision for his child, if that is done by the appropriation of a freehold estate, the extent of the provision being undefined, there is no reason for increasing it by the addition of copyhold estate: in the other, the testator meaning all his debts shall be paid, must be considered as intending to provide a fund sufficient to answer that, his purpose and intention."

(a) A court of equity supplies the want of surrender to the uses of a will for three sorts of persons, wife, creditors, children. For the doctrine as to the first, vide *Chapman v. Gibson*, post, 229. As to the second, *Kentish v. Kentish*, post, 257. As to the last, vide Mr. Cox's note to *Watts v. Bullas*, 1 P. W. 60, 61; *Watkins on Copyholds*, 211; *Scriven on Copyholds*, 135; *Sugden on Powers* (4th Eng. ed.) 350, et seq. >; *Rumbold v. Rumbold*, 3 Ves. 65; *Hills v. Downton*, 5 Ves. 563; *Blunt v. Clitherow*, 10 Ves. 599; *Fielding v. Winwood*, 16 Ves. 90; *Garn v. Garn*, ib. 268; *Sampson v. Sampson*, 2 V. & B. 337. That this equity is not extended to grandchildren, vide *Parry v. Whitehead*, 6 Ves. 544, nor to a natural child, *Cricket v. Dolby*, 3 Ves. 10, in which two cases the former authorities are collected. As to the doctrine of the Court, with respect to the provision of an heir-at-law against whom a surrender is to be supplied, vide *Chapman v. Gibson*, cit. sup. — *Eden*.

**HOUGH v. WILLIAMS*. Lincoln's-Inn-Hall, 11th Dec. [*190]

(Reg. Lib. 1790. A. fol. 61.)

Where parties go before the Master upon a reference, he must receive interrogatories from both, though one of them should not have gone into any proof in the former stage of the cause. (1)

THE bill was filed to set aside certain securities obtained by the defendant, from the plaintiff.

The general nature of the case was, that the plaintiff was a young man in expectation of a large property which was in this Court, and having occasion for money, applied to the defendant, who is a tailor, to help him to it; that, on such application, the defendant sold to the plaintiff, at different times, horses and cattle, at very extravagant prices, which the plaintiff had turned into money, at a great loss. For these articles, the plaintiff had entered into bonds, and warrants of attorney, to confess judgment to the defendant. The bill charged, that the horses and cattle, &c. sold, were sold at prices far beyond their real value, and stated the loss sustained by each particular sale: and the plaintiff had given evidence of this, but the defendant had entered into no proof as to it.

Mr. Justice *Buller* sitting for Lord Chancellor, had made a decree,

(1) Vide the next note, and *S. P. Smith v. Althus*, before Lord Eldon, C., 11 Ves. 564, and see *Sandford v. Paul*, 370, and note.

that the Master should take an account of what the horses and cattle were really worth at the time of the respective sales, and that the bonds and warrants of attorney should stand as a security only for what the Master should find them really worth.

When the parties went before the Master upon this reference, the defendant offered to exhibit interrogatories, for the examination of witnesses, to prove the real value of the horses and cattle at the time when they were sold; but the Master refused to receive them, on the ground that the point had been expressly put in issue in the cause, and the defendant might, therefore, have examined witnesses to this point in the cause.

It was moved, on the part of the defendant, that the Master might be directed to receive these interrogatories; and

Lord CHANCELLOR said, he could not conceive how the Master could doubt about it; (2) for the decree implied that the Master was to receive evidence as to the value: and directed the Master to receive the interrogatories. (2) (a)

(2) The order was, that "the Master should certify on what ground he refused to admit the interrogatories;" and the benefit of the notice was saved until after the Master had made his certificate. — R. L.

(a) The decree directing the inquiry or account, in such case, would be considered the leave of the Court given for further examination upon the point of the investigation directed. 2 Smith, Ch. Pr. (Am. ed.) 144, 145. See 2 Madd. Ch. Pr. (4th Am. ed.) 514, 515.

[*191] **Ex parte* WARDER in the Matter of WHITESIDES,
a Bankrupt.

Lincoln's-Inn-Hall, 29th Dec. [Vide S. C. Cooke, B. L. 149.] (6th ed.)

Arresting the bankrupt before commission, and keeping him in execution after an election. (2)

THE petitioner had arrested the bankrupt before the commission, and charged him in execution after the commission: (1) he never proved his debt under the commission: the bankrupt obtained his certificate, and the petitioner then applied to the commissioners to prove the debt; which they refused, on the ground that the debt was discharged, by the creditor having kept the bankrupt in execution, and elected that remedy, without attempting to prove the debt under the commission.

The petition prayed to be admitted to prove this debt:

And Mr. COOKE, in support of the petition, mentioned Blumfield's case in 5 Rep., to show that where an execution, by *ca. sa.* was defeated by the act of God, or of the law, the debt was not satisfied by that execution; and argued it was defeated here, by the act of the law.

But, Lord CHANCELLOR said the creditor not having proved his debt under the commission (in which case he might have been put to his elec-

(1) The bankrupt had been charged in execution by the agent of the petitioner, he being abroad. Vide Cooke, B. L. 149.

(2) S. P. *Ex parte* Cator, *postea*, 216. If, however, a bankrupt surrenders merely in discharge of his bail, and is not charged in execution, the party will not be held to have made an election. *Ex parte* Cundall, 6 Ves. 446; *Ex parte* Arundel, 18 Ves. 231, and 1 Rose, B. L. 143, from which it appears that the statute, 49 Geo. 3, c. 121, § 14, does not apply to conclude a person in such a case.

tion) had elected to take his remedy at law, and must take the consequences of it : and

Dismissed the petition. (a)

(a) This is, probably, the same case, as the one under this name in Cooke's B. L. 7th edit. 149. It appears by that report, that the petitioner being in America, his agent here thought proper to charge the bankrupt. The commission issued on the 7th of August, 1789, the bankrupt having been taken in execution at the suit of other creditors. The action was commenced in June, 1789, and in Easter term, 1790, the bankrupt was charged in execution at the petitioner's suit. The petitioner did not arrive in England till afterwards. A similar point was determined in the same bankruptcy, *Ex parte Cator*, post, 216. See, upon this subject, *Ex parte Knowell*, 13 Ves. 192 ; *Ex parte Parquett*, 14 Ves. 493. — *Eden*.

MANGLEMAN v. PROSSER. (1)

Lincoln's-Inn-Hall, 11th Dec. Third Seal after Term.

After an order to speed the cause, the plaintiff has a whole term and [or] (1) vacation to proceed in, before the bill can be dismissed.

MR. EMLYN moved to dismiss the bill with costs, upon the ground that, on a former motion for the same purpose, on the eleventh of last month, there had been an order to speed the cause, and no proceeding had been had since. He insisted that, by the course of the Court, there must be a proceeding within one month.

But Lord CHANCELLOR having consulted the Register, and the gentlemen best acquainted with the practice of the Court, *who [*192] agreed that the plaintiff, after such order, had a whole term and [or] (2) vacation to proceed in, before the bill should be dismissed, Refused the motion.

(1) It is to be lamented that Mr. Brown's erroneous report of this case occasioned much confusion in the practice for a very long space of time ; see the report of *Findlay v. Wood*, 1 Ves. & Beames, 499. It is, however, remarkable, that the word [or] now introduced in the above marginal note is from the pen of Mr. Brown himself, in his corrections for a new edition ; but even that (much as it varies the original proposition) is incorrect. The Editor will soon advert to the fact of Mr. Brown's having actually mis-stated the nature of the principal case ; but it is most important to premise, it now seems settled, that the party is not entitled to a vacation as well as a term. See *Wilson v. Timpson*, 2 Madd. Rep. 123, 124, correcting the report of *Findlay v. Wood*, 1 Ves. & Beames, 499, and see the cases in the notes, 2 Madd. Rep. 123, 124. { See also *Desgraves v. Lane*, 15 Ves. 291 ; *Pitt v. Watts*, 16 Ves. 126 ; *Naylor v. Naylor*, ib. 127 ; *Brown v. Byne*, 1 Ves. & Bea. 310 ; *Fuller v. Willis*, 3 Ves. & Bea. 1 ; *Day v. Ince*, ib. 170. }

It appears from R. L. that the motion before the Court upon the above occasion was quite of a different nature. The plaintiff, having in the previous Trinity vacation been ordered to speed his cause, afterwards obtained an order to amend his bill, which the defendant moved to discharge soon afterwards : the Court upon this, ordered the plaintiff to go to commission in that vacation, to procure publication to pass as of Michaelmas term, and to set down his cause for hearing in the Hilary term then next ; or in default, &c. (R. L. 1789, B. fol. 502.) It was in this state of the proceedings the matter in question came on ; and instead of being as reported by Mr. Brown, the fact was, that the defendant failed in his motion to dismiss, because it was premature from its being made before Hilary term ; the plaintiff having that whole term for setting down his cause under the order above alluded to. In the next Hilary term the plaintiff applying for an extension of the time to set down his cause, his motion was dismissed with costs. — R. L. 1790, B. fol. 142. The Editor has been under particular obligations to Mr. Crofts and Mr. Walker (two of as able and experienced Registrars as ever sat in the Court of Chancery) for directing his researches in this matter, and for much useful information on the subject.

(2) From Mr. Brown's own MS. correction in his own copy, now before the Editor. See the preceding note.

BAUGH v. REED. (1)

[Vide S. C. 1 Ves. 257. (1) Lincoln's-Inn-Hall, 14th Dec.

(Reg. Lib. 1790. A. fol. 233.)

A portion given after a legacy, shall not be a satisfaction of it, where it is expressly given in satisfaction of a different claim; or where it is given absolutely, and the legacies under limitations. Neither can a legacy be a satisfaction for a claim *aliunde*, unless clearly expressed to be so intended. (2) Where the suit is occasioned by a difficulty in discovering the testator's meaning, the costs shall come out of the fund.

THE testator, James Reed, the elder, had six children, James, Sarah, Mary, William, Thomas, and Charlotte, who were entitled under the will of their grandfather, William Martin, upon their attaining their respective ages of twenty-three years, to two sums of 5000*l.* each, making 10,000*l.* which had been paid into the bank, in consequence of an order of this Court, and laid out in the purchase of 11,315*l.* 8*s.* 4*d.* three per cent. bank annuities, which, being divided into six parts, came to 1885*l.* 18*s.* and a fraction of a penny each; and such of the children as had attained their ages of twenty-three before the testator made his will, viz. James, Sarah (now Jones), and Mary (late Fydell, deceased), had applied for their shares, which had been transferred to them; and James Reed (the eldest son) transferred his sixth, 4th September, 1783, to the testator his father; Sarah (the eldest daughter), on the 8th of February, 1784, executed a power to the house of Escot Reed and Co. for transferring her sixth of the said stock; (but the same was a general power to accept, receive dividends, and transfer, not naming to whom.) The daughter Mary, and her husband, Richard Fydell, by their marriage articles, dated 24th March, 1784, covenanted that her sixth should become the property of her father; and 29th April following, it was transferred into his name. William Reed, the next son, 4th August, 1784, transferred his sixth into the name of his father. On the 30th July, 1784, the testator made his will (being then possessed of 32,771*l.* 16*s.* 2*d.* bank three per cents.), and thereby gave to his son, the defendant James Reed, defendants Elton and Dyson, and his son, defendant Thomas Reed, 8114*l.* 1*s.* 11*d.* three per cent. consolidated bank annuities, part of his capital therein, in trust to pay the dividends to his son William Reed, for life, and after his decease to divide the principal among his children or grandchildren, &c., and he gave to the same trustees three like sums of 8114*l.* 1*s.* 11*d.* in the same stock, other part of the said capital therein, in trust for his son [*193] *Thomas, and his daughters Sarah and Charlotte, and their respective children and grandchildren; and he gave to the same trustees 3103*l.* 9*s.* of the said fund, other part of his capital therein, for his daughter Mary Fydell (to whom he declared he had already given a fortune), and her children and grandchildren; and gave the residue to his son James Reed, whom he appointed executor.

After the making of the will, on the 1st September, 1785 (the testator being then possessed of 34,657*l.* 14*s.* 2*d.* bank three per cent. annuities),

(1) The report in 1 Ves. jun. 257, is very full, and much preferable.

(2) Upon the point of satisfaction, or otherwise, see *Rickman v. Morgan*, antea, 1 vol. 63, &c., and 2 vol. 394, &c.; *Moulson v. Moulson*, antea, 1 vol. 82; *Haynes v. Mico*, ibid. 129, &c.; *Attorney-General v. Hind*, ibid. 170, &c.; *Peacock v. Falconer*, ibid. 295; *Warren v. Warren*, ibid. 305, &c.; *Grave & Salisbury & Holmes v. Holmes*, ibid. 425, 555; *Kirkman v. Kirkman*, antea, 2 vol. 95; *Ellison v. Cookson*, ibid. 397; *Debeze v. Mann*, ibid. 165, 519; *Powel v. Cleaver*, ibid. 499, and *Hanbury v. Hanbury*, ibid. 352, 529, with the notes to each of those cases by both the English and American Editor.

plaintiff Charlotte intermarried with plaintiff Isaac Baugh, and by their marriage settlement, plaintiff Isaac Baugh, in consideration of 5000*l.* in bank three per cent. consolidated annuities, which were to be accepted by him as the portion of Charlotte, his wife, and in satisfaction of her contingent right to the legacy given by her grandfather's will, covenanted, within one month after she should attain her age of twenty-three years, to release her share of the said legacy to her father.

The bill was filed for the plaintiff's legacy, (2)

And two points arose, 1st. A question whether the portion given to the plaintiff Charlotte Baugh, was, *pro tanto*, an ademption or a satisfaction for her legacy under her father's will? 2d. The other, whether the 1885*l.* 18*s.* which continued to stand in Mrs. Jones's name, was her property or the property of the father?

As to this latter point, a great deal of evidence was read; particularly that of James Reed the brother, who swore, that the power of attorney was given for the purpose of a transfer to the father, which had not been made by mistake, but he had received the interest till his father's death, and carried it to his account. On the contrary, evidence was read in support of the answer, that, at the time she executed the power of attorney, she was very ill, and scarcely knew what she did, and that she received no consideration for it. If this 1885*l.* 18*s.* was included in the father's stock, it was sufficient to pay the specific legacies, and to leave a surplus; if not, the consequence was, that there would be a deficiency.

Mr. *Solicitor-General*, and Mr. *King*, for the plaintiffs. The first question is, whether the 5000*l.* portion is, *pro tanto*, a *satis- [*194] faction for the 8000*l.* legacy or not; we contend that it cannot be so considered. Where a parent gives a portion, after a legacy, it must be admitted that it is, in general, to be considered as a satisfaction of the legacy; but it is not so where the parent expressly points out for what it shall be a satisfaction; that is done here, for it is taken, by the settlement, in satisfaction for the 1800*l.* to which she was entitled under the will of her grandfather. Without the settlement, she would have been entitled to the 8000*l.* legacy, and the 1800*l.*; but this last is expressly satisfied by the portion. Then the question is, whether the portion which is granted absolutely, by the father as his own money, and without any limitations, shall also be as a satisfaction for the legacy which is given to Mrs. Baugh for life, and then to her children or grandchildren.

With respect to the other point, it is our client's interest to contend that the share intended to be transferred by Sarah ought to be considered as part of the father's personal estate. The fund will not be sufficient to pay the specific legacies, unless this is considered as part; the evidence all tends to show the father considered it so; all the other children as they attained twenty-three, had transferred their shares to the father, who certainly thought that this share had been transferred, as it was commonly supposed in the family to have been; Mr. and Mrs. Jones must therefore elect between this sum and her legacy.

The Reporter did not hear the argument for the defendant.

Lord CHANCELLOR, this day, gave judgment. He said the portion could

(2) See the report, 1 Ves. jun. 258, from whence it appears that, after a decree for the usual accounts, the Master had reported against the claim of the defendant Jones. To that report exceptions were taken; which now came on, with the cause, on further directions: a question also arising upon the Master's admission of parol evidence. See Mr. Vesey's report, *passim*.

no more be considered an ademption of the legacy, than a satisfaction; as to the question of election, he thought the evidence was not satisfactory to drive Mr. and Mrs. Jones to an election. He thought it not sufficient to enable him to pronounce that the testator did not mean she should have both the legacy and the 1800*l*.

Therefore, the plaintiffs Baugh and his wife must have the 8000*l*. and a fraction, given by the will, notwithstanding the advancement of the 5000*l*. on the marriage; and there being a deficiency, the Master must make an apportionment, and the apportionment, when made, must [*195] be (3) paid to the trustees, to the *uses of the will; and Mr. and Mrs. Jones must retain the 1800*l*. and also have their apportionment of the legacy. (a)

And this being the common case of a legatee bringing a bill for a legacy, and the difficulty arising upon the testator's meaning, under all the circumstances of the case, the costs must come out of the fund. (b)

(3) "Carried over by the Accountant-General to their account, in trust in the cause, upon the trusts, and subject to the contingencies in the said testator's will mentioned concerning the same," &c. — R. L.

(a) See 2 Williams, Ex. Pt. 3, Bk. 3, ch. 3, § 2, p. 827, 828. See also cases cited in note (2), ante, 193.

(b) Joliffe v. East, ante, 27, note (c) and cases cited; Sawyer v. Baldwin, 20 Pick. 388, 389.

DIMMOCH [DYMCK] v. ATKINSON.

Lincoln's-Inn-Hall, 17th, 18th, Dec.

(Reg. Lib. 1790. A. fol. 31. b.)

Where a married woman will consent to have part of her fortune (in court) paid to her husband, it must be so. (1)

THIS was a petition, by the husband, to have part of his wife's fortune, which was in this Court, paid to him.

It appeared that the husband was by trade a glover, and had six children by his wife, who was in court, and consented.

And although it was strongly opposed by Mr. Lloyd, for the trustees in the marriage settlement, (2) yet, the wife persisting, after a long examination, in her consent, the Lord Chancellor, after taking till the next morning to consider of it, made the order. (a)

(1) There was formerly much inconsistency in the decisions on this subject, which the Editor has noticed in his supplement to Vesey, sen. p. 433. The existing practice, however, is as above, and agreeably to the decision of Willats v. Cay, 2 Atk. 67, contra to Lord Hardwicke's determination in Ex parte Higham, 2 Ves. 579. Vide per M. R. in Wright v. Rutter, 2 Ves. jun. 677, and per Lord Eldon C. in Murray v. Lord Elibank, 10 Ves. 88.

(2) The reporter was mistaken. No settlement had been made on the wife, and she declined having any. — R. L.

(a) Clancy, Rights of Women (Am. ed.), ch. 8, 537, et seq.; Sawyer v. Baldwin, 20 Pick. 378. [Where the fund has been settled, the modern cases cited in the note to Frazer v. Baillie, ante, vol. i. 518, have established, that the Court will not authorize the wife's departing with the fund to any person, though she should consent on her examination; and as appears by Minet v. Hyde, ante, vol. ii. 663, and the cases there cited, a positive affidavit is required, that there has been no settlement on the marriage, or at least, that the wife's money has not been the object of it. See also upon this subject, Bourdillon v. Adair, post, 237. — Eden.]

CAMPART v. CAMPART. Lincoln's-Inn-Hall, 18th Dec.

(Reg. Lib. 1790. A. fol. 93.)

The Court will not direct money to be paid out to an infant-executrix, (1) but will refer it to the Master to inquire whether there are any debts or legacies, and to consider of a maintenance.

A PETITION by a female infant of the age of eighteen, who was executrix of the will of her sister [late a co-plaintiff with her], who had attained twenty-one (which will the petitioner had proved); stating the will of Francis Campart the father, whereby the residue of his personal estate was given to the petitioner and her deceased sister, in equal shares, at their respective ages of twenty-one years: and praying that her sister's share of the property, which had been paid into Court, might be paid to her as executrix: but the petition did not state that there were any debts, or any particular call for the fund.

A former petition to the same effect, had been presented to the Master of the Rolls, who had refused to order the payment *of the [*196] money, but referred it to the Master to inquire whether there were any debts or legacies to be paid. Upon which the present petition was presented to the Lord Chancellor; and, coming on to be heard this day,

Mr. *Mitford*, in support of the petition, said, that the petitioner, notwithstanding her infancy, might be plaintiff at law for all the rights of her sister, although he apprehended that she could not be guilty of a *devastavit* before twenty-one; that therefore he apprehended that she was entitled to have a fund in this Court paid out. That, if there were any debts or legacies to be paid, the Court would order it to be paid out.

LORD CHANCELLOR doubted whether, even in that case, he could order it to be paid; but said that the infant was entitled to the same protection with respect to this property as any other: he, therefore, confirmed his Honor's reference, with the addition of the Master considering of a proper maintenance for the infant. (a)

(1) The inconveniences in such cases were greatly felt in *Ex parte Sergison*, 4 Ves. 147, 148, and produced the provisions in the 6th and 7th sections of the act of the 38 Geo. 3, c. 87. Whereby, in the case of an infant sole executor, administration with the will annexed shall be granted to the guardian, *duranti minori etate*. See Mr. Vesey's note, *ibid.* 149.

(a) See 1 Macpherson on Infants (Eng. ed. 1841), ch. 22, § 12, p. 287.

BURTON v. ELLINGTON. Lincoln's-Inn-Hall, 16th Jan. 1791.

(Leg. Lib. 1790. A. fol. 93. entered *Burton v. Petire*.)

Plea of an award and release to a bill to open an account. [Ordered to stand for an answer with liberty to except.] (1)

BILL to open an account for fraud, setting out particular instances of error and fraud in the account. The bill stated that there had been a

(1) There was an egregious mistake in the former edition, in stating the plea was allowed; but Mr. Brown's copy, corrected for a further edition, rectifies it, and agrees with Reg. Lib. *ubi supra*, and the notes of Lord Redesdale. The plea was, in fact, overruled; but allowed to stand for an answer with liberty to except.

reference and award, but charged that there would not have been such an award, if papers had been produced which were withheld by the defendant.

To this bill the defendant pleaded the award; (2) and the plea also stated a release of the matters contained in the bill.

Lord CHANCELLOR overruled the plea. (1) (b)

(1) See note (1) preceding page.

(2) As to Pleas of an Award, vide Beames, El. Pl. 230, 231, and the notes.

(b) See *Halfhide v. Fenning*, 2 Bro. C. C. 336, 337, and notes and cases cited; *Story*, Eq. Pl. ch. 14, § 803, § 804.

[*197] **Ex parte* SHAKESHAFT, in the Matter of KEMPSON,
a Bankrupt.

Lincoln's-Inn-Hall, 21st Jan. 1791.

K. and S. being trustees of money in the funds, sell it for the benefit of S. who dies insolvent, and K. becomes bankrupt: the person interested in the funds may prove against the estate of K. the value of the funds at the bankruptcy though S.'s estate be first liable. (1)

JOHN SHAKESHAFT, by will, left 2000*l.* 3 per cent. bank annuities to his executors after-named, in trust to pay the dividends to Ann Shakeshaft, his wife, for life; afterwards to the petitioner George Shakeshaft, his son, for life; and, after his death, the principal to be equally divided among his children at twenty-one; but, if they all died under that age, then to be divided among all the children of his brother Richard Shakeshaft; and he appointed Samuel Kempson, the bankrupt, and the said Richard Shakeshaft, executors.

Soon after his death, viz. in 1782, the two executors joined in selling out this sum of 2000*l.* 3 per cents., and Kempson permitted Richard Shakeshaft to take it to his own use, upon giving an undertaking in writing to replace it upon demand; and Richard Shakeshaft continued to pay the amount of the dividends upon the stocks sold out, to Ann, the widow, till his death, in 1790, when he died insolvent, and then the transaction of the sale of the stock was discovered.

In December, 1790, Kempson became a bankrupt.

George Shakeshaft, by his petition, now prayed that he might be at liberty to prove under Kempson's commission, on behalf of himself and the other parties interested in the 2000*l.* bank annuities, under the will, so much as was the market price of those annuities at the time of the commission (stocks having risen very considerably between the time that the funds were sold out and the date of the commission), and that the dividends might be paid, by the assignees, into the bank, subject to further order.

This petition was opposed by the assignees of Kempson, who insisted that the petitioner ought first to have recourse to Richard Shakeshaft's effects, who had received the money and applied it to his own use, whereas Kempson had never received any benefit from it; but that, if the proof was to be admitted, it should only be for the money produced by the sale of the stock, which was 400*l.* less than what the petitioner prayed to be admitted to prove.

(1) See the next case; likewise *Ex parte* Leeke, *antea*, 2 vol. 596, and Cooke, B. L. 153, 154 (6th ed.).

*But Lord CHANCELLOR said, that the question between the two [*198] estates of Kempson and Richard Shakeshaft must be settled hereafter, on a bill; but as Kempson, who was the surviving executor, had been guilty of a breach of trust, it was very clear that the petitioner, or some one on behalf of the parties interested, ought to prove the debt under the commission, for the sake of securing the fund, until it should be seen to whom it belonged.

And as to the amount of the debt to be proved, it was the common rule in equity, that where a trustee had made use of a trust fund, he might be compelled by the *cestui que trust*, either to replace the fund, or to account for what he made of it, as it should appear most for the benefit of the *cestui que trust*; that, therefore, the petitioner must be at liberty to prove what it would have cost Kempson, at the time of the bankruptcy, to have replaced the stock: and his Lordship directed the assignees to pay the dividends into the bank, subject to further orders.

Ex parte JOHN SHAKESHAFT. Lincoln's-Inn-Hall, same day.

Where the bankrupt and another are executors of a creditor of the bankrupt, the Court will permit the other executor to prove the debt, even though a suit is pending in the ecclesiastical court, as to the executorship. (1)

THIS was a petition of John Shakeshaft in the same bankruptcy. It stated that Kempson, the bankrupt, was indebted to Richard Shakeshaft, petitioner's father, in his lifetime, to the amount of 900*l.*, in balance of accounts. That Richard Shakeshaft, by his will, had appointed Kempson and the petitioner joint executors, but that Kempson had entered a *caveat* in the ecclesiastical court, against the probate of that will, insisting on the inability of the testator to make a will at the date of it, and setting up a former will, by which he, Kempson, was sole executor and residuary legatee. This petition prayed that the petitioner might be at liberty to prove this debt under the commission, and that the dividends should be paid into the bank by the assignees, pending the contest in the ecclesiastical court, and until further order.

This was opposed on the part of the assignees, on the ground that, though in cases where the bankrupt was the executor, the Court would appoint a person, in the nature of a receiver, to prove a debt under the executor's commission, there being no *other manner of secur- [*199] ing the fund; yet, in this case, there being no executor, the ecclesiastical court will grant administration, *pendente lite*.

But Lord CHANCELLOR made the order in the form prayed.

(1) Vide *Ex parte* Leake, *antea*, 2 vol. 596; Cooke, B. L. 153, 154 (6th edition), 1 Montague, B. L. 144, and 2 Christ. B. L. 359.

HILARY TERM.

31 Geo. 3. 1791.

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THORNTON [THOMPSON] v. DIXON.

Lincoln's-Inn-Hall, 28th Jan. and 18th March

(Reg. Lib. 1790. fol. 564.)

Real estate used for purposes of a partnership trade shall go to the heir, not to the executor. (1)
 Though a copartnership agreement may alter the nature of real estate, yet it must be expressed so to do. (1)

JOSEPH DIXON, Thomas Horn, and James Sowter, in 1761, being seised in fee of some land called Broadmoor, entered into partnership, for twenty-one years, as paper-makers, and mills were erected upon the land, and they declared the uses of the land to the use of themselves in fee, as tenants in common.

In 1764, they entered into another partnership for twenty-one years, by deed, taking in four new partners, Isaac Dixon, Jacob Dixon, Lancelot Dixon, and Joseph Crosthwaits, in different proportions; and in the partnership-deed there was a covenant from the three original partners, to stand seised of the land, in trust for the copartnership, in the proportions in which they were respectively interested therein; and a proviso that, in case any of the partners wished to dispose of his and their shares, he or they might do so, giving notice to the other partners, in order that they might have an opportunity of purchasing. That partnership term expired, and they went on afterwards without any new agreement.

During the second partnership, they bought a freehold messuage, with a little land adjoining, called Low Meerbeck, for the better carrying on the trade, which was enjoyed by the partners as joint-tenants.

Joseph Dixon possessed, by purchase from the others, one half of the whole concern, and died, leaving a widow, Barbara, who was his second wife, a son, Jacob, and a daughter, Ann, his children by his former wife.

The son carried on the trade as a partner, and received the profits till his death, and died leaving his sister Ann his heir, and she was admitted a partner, and died. The plaintiff, her husband, took out administration to her, and under a settlement made after his marriage, by which,

(1) It is most observable that this decision (and some modern cases determined on its authority) seems very questionable. *Bell v. Phyn*, 7 Ves. 453, and *Balmain v. Shore*, 9 Ves. 500, were S. P. But Lord Eldon C. has retained a different opinion, and has decided accordingly, in cases where the real estate has been purchased either in whole or in part out of the partnership funds. In *Selkrigg v. Davies*, Dom. Proc. 1814, 2 Dow. P. C. 231, Lord Eldon C. said, "My own individual opinion is, that all property involved in a partnership concern ought to be considered as personal;" and his Lordship's determination above alluded to is that of *Towndend and Others v. Devaynes and Others*, reported alone in the Appendix to Mr. Montague's valuable work on Partnership, 1 vol. App. p. 97. The last-mentioned opinion and determination, from such high authority, leads Mr. Montague thus to express the existing law upon the point. "It seems that a partner's interest in partnership real property is, upon his death, distributable as personal property." 1 Mont. on Partnership, p. 164. The note there intimates that the House of Lords also had so decided; but the Editor can find no trace of it, and is informed (12th April, 1820), that the exact point has been again lately argued before Lord Eldon C., and that his Lordship still retains the same opinion; although the question has not as yet been finally disposed of.

in default of appointment *of uses therein mentioned, the estate [*200] was limited to himself and his wife in fee, he claimed, as survivor, his wife's moiety in Broadmoor and Meerbeck.

The other partners had refused to pay him the profits of the concern, since his wife's death, but submitted to account as the Court should direct.

The defendant, Barbara Dixon, widow of Joseph Dixon, claimed her dower in Broadmoor, and her share, under the custom of the province of York, of the husband's personalty, and also her distributive share under the statute; and defendant, Jonathan, the heir of Ann, claimed her real estate.

It was objected, by the partners, defendants, that the settlement could give no right to the plaintiff in his wife's share, there having been no license or consent thereto by the other partners, pursuant to the clause in the deed of partnership.

The only question at the hearing, was as to the equitable quality of Broadmoor and Meerbeck.

LORD CHANCELLOR said he had always understood, that where partners bought lands for the purpose of a partnership concern, it was to be considered as part of the partnership fund; and that, consequently, Broadmoor and Meerbeck must be considered as personal estate, and distributable as such. (2) And that, as the surviving partners were not bound to admit the representatives of a deceased partner, after the expiration of the term, to the partnership, the concern must be sold and divided, and distributed as personalty, among the claimants, according to the rules of law.

It was suffered to stand over, for the partners to agree among themselves about selling the concern; and his Lordship gave liberty to argue the nature of the property, if his proposition on that point could not be maintained.

Upon the cause coming on again [18th March, 1791], Lord Chancellor thought that, had the agreement been, that the mills should be valued and sold, it would have converted them into personalty of the partnership; but that the agreement, in this case, was not sufficient to vary the nature of the property; therefore, that after the dissolution, the property would result according to its respective nature, the real as real, the personal as personal, estate. (3) (a)

(2) Vide note (1) agreeably to this first impression of his Lordship.

(3) Sir John Simeon's MS. note of the result on this occasion is as follows:—

"But afterwards, on the cause coming on again, Lord C. held, that, as between the representatives of a person interested in the concern, the property should go according to its real nature, i. e. freehold to the heir, personal to executor, notwithstanding they are used together for the purposes of trade. The parties not having agreed, a sale was directed."

(a) It was held in the Superior Court of New York, upon the strength of the ultimate opinion of Lord Thurlow in the principal case, and of the opinion of the Master of the Rolls in the case of *Balmain v. Shore*, 9 Ves. 500, that the principles and rules of law applicable to partnerships, and which govern and regulate the disposition of partnership property, did not apply to real estates; and that in the absence of special covenants between the parties, real estate owned by partners, was to be considered and treated as such without any reference to the partnership. *Coles v. Coles*, 15 John. 159. See also *Smith v. Jackson*, 2 Edw. 28.

In *Goodwin v. Richardson*, 11 Mass. 469, the decision is nearly to the same effect. The Court, in this last case, state that a purchase of real estate with partnership funds would make the partners tenants in common of the real estate, and the act would create a division of the joint stock, pro tanto. See also to the same point, *Deloney v. Hutchinson*, 2 Rand. 183; *Yeatman v. Woods*, 6 Yerger, 20. See the remarks of Mr. Justice Story, upon the case of *Goodwin v. Richardson*, supra, in *Hoxie v. Carr*, 1 Sumner, 185. See also *Burnside v. Merrick*, 4 Metcalf, 541.

The general principle now declared in the English law is, that real estate acquired for the purpose of a trading concern, is to be considered as partnership property, and to be first applied in satisfaction of the demands of the partnership. *Fereday v. Wightwick*, 1 Russ. & My. 45. It is taken to be personal estate, and retains that character as between the real and personal representatives of a deceased partner. *Phillips v. Phillips*, 1 Mylne & Keene, 649; *Broom v. Broom*, 3 Mylne & Keene, 443; *Morris v. Kearsley*, 2 Younge & Coll. 139; 3 Kent (5th ed.), 37, 38, 39, and notes. See also Mr. Rand's note to *Goodwin v. Richardson*, 11 Mass. 476, and the cases cited; *Ford v. Herron*, 4 Munf. 316; *Hart v. Hawkins*, 3 Bibb, 606; 1 Story, Eq. Jur. ch. 15, § 674; *Randall v. Randall*, 7 Sim. 271; *Bligh v. Brent*, 2 Younge & Coll. 263, 288; *Baird v. Baird*, 1 Dev. & Bat. Eq. 524; *Sigourney v. Munn*, 7 Conn. 11; *Donaldson v. Bank of Cape Fear*, Dev. Eq. 103; 3 Sugden, Vend. & Purch. (6th Am. ed.) 167, and notes [249]; *Collyer on Partnership*, B. 2, ch. 1, § 1 (2d Am. ed.), p. 69, et seq. and a statement of the doctrine upon this subject, in several of the States given in the notes. See also for the American law upon this subject, 3 Kent (5th ed.), 37, 38, 39, and notes. Mr. Chancellor Kent seems very much to favor the general principle, said above to be now declared in the English law. See the text and notes at the pages cited above. 3 Kent, (5th ed.) See *Hoxie v. Carr*, 1 Sumner, 181 - 186.

In the learned work of Mr. Justice Story on Partnership, it is said, that "a question has been made, whether, in the absence of any agreement, or other act, affecting its general character, real estate, held as a part of the partnership funds, or stock, ought to devolve upon, or descend as real estate to the heir or devisee, or ought to belong as personalty to the executor or administrator, upon the death of the partner. Upon this point there has been a diversity of judicial opinion, as well as of judicial decision; some judges holding, that in such case it retained its original character of real estate, and passed to the heirs or devisees accordingly; and others holding, that it was to be treated throughout as partnership property, and therefore as personalty, and belonged to the executor or administrator. The doctrine under these circumstances must be considered as open to many distressing doubts." Story, Partnership, ch. 6, § 93, and note at the end of the section.

A very late case, decided by Sir L. Shadwell, Vice Chancellor, has upheld the doctrine of Lord Thurlow in the case of *Thornton v. Dixon*, in the text. *Cookson v. Cookson*, 8 Sim. 529. In a late case at law in Maine, it was decided, that real estate purchased with partnership funds for partnership purposes, and so used and enjoyed, is held by the members of the firm as co-tenants — and the superior right of the partnership creditors over the creditors of the individual partners does not apply at common law to real estate thus purchased. *Blake v. Nutter*, 19 Maine, 16. Whether a different rule should be adopted in equity is left undetermined. *ib.*

In a late case in equity in Massachusetts, it was held that real estate, purchased by partners for partnership business and with the partnership funds, though conveyed to them by such a deed as in case of other parties, would make them tenants in common, is considered in equity as part of the partnership stock, and is to be applied, if necessary, towards the payment of the partnership debts. *Burnside v. Merrick*, 4 Metcalf, 637; *Dyer v. Clark*. Decided March term, Suffolk, Mass., 1843. See also *Hoxie v. Carr*, 1 Sumner, 181 - 186, Rand's note to *Goodwin v. Richardson*, 11 Mass. 476, and cases cited.

[*201] *CLINTON v. HOOPER. [Vide S. C. Ves. jun. 173.]

(Reg. Lib. 1790. A. fol. 119.)

Where a wife's estate is mortgaged for the benefit of the husband, she has a right to stand as a creditor; (1) but this may be repelled by evidence to show her intention to the contrary. (2)

BILL by the plaintiff, widow of William Clinton, to have her estate exonerated, by the estate of her husband, from a mortgage made by the husband and plaintiff, and for which he received the money.

(1) The Editor has to congratulate the profession, that upon this and other subjects of marital law, he can now refer to Mr. Roper's Treatise, in 2 vols. upon "The Law of Property arising from the relation of Husband and Wife." The subject in question is discussed, *ibid.*, in the first volume, from p. 139, *passim*, with the authorities; and that discussion leads to the lately much considered important question, as to the effect of a mortgage of the

(2) Mr. Roper observes, *ubi supra*, p. 149, that when it does not appear from the deed, evidence is admissible to show whether the money raised was for the husband or his wife. But parol declarations of the wife, of her agreement to make a gift of the money to her husband, are inadmissible.

Plaintiff, in the year 1746, intermarried with William Clinton (who was then in indifferent circumstances), and he received from her father a proper fortune. In the year 1762, she became entitled, upon the death of her brother, William Smith, intestate, and as his heiress-at-law, and by the custom, to freehold and copyhold estates, which latter were surrendered by her "to the use of William Clinton, and Mary his wife, their heirs and assigns forever." Afterwards, there being an opportunity of purchasing the estate on which the husband lived, he agreed to purchase the same for 7600*l.*; and, in order to raise the money, he prevailed upon the plaintiff to join in selling some part of her real estate, and in mortgage of the copyhold which had been so surrendered, to the defendant, Deans, for 1500*l.*, which the husband received, and applied to the purchase. Her consent to this was obtained by a promise to settle the estate, which was to be purchased, to the same uses to which the plaintiff's estate was settled; but this was never performed. Clinton made his will, dated 26th October, 1776, and thereby gave a house to the plaintiff for life; and also gave to trustees for her an annuity of 60*l.* a year during her life. He devised the newly-purchased estate to his nephew William Hooper. He also gave his ready money, and securities for money, to pay his debts and legacies, to the amount of about 1600*l.*, and gave the residue to his nephew William Hooper, and appointed the plaintiff, and William Hooper, *his executors. The testator, afterwards, made a codicil to his [*202] will, dated 11th October, 1776, whereby he revoked a devise in his will, of a moiety of a messuage called the Bankhouse, to his nephew George White, and several legacies which were to be payable thereout, and devised the same to plaintiff for life, with remainders over. The testator died 17th October, 1781, and the executors proved the will, and possessed the effects (except the furniture, which was given to plaintiff for life); more than sufficient to pay the testator's debts, including the 1500*l.* mortgage-money.

Plaintiff filed her bill to have the estate exonerated; to which Hooper, the devisee, put in an answer; in which he contested plaintiff's right, on the ground that it was a voluntary gift, by the plaintiff to her husband, of the money, in order to enable him to complete the purchase, which had been made at her request. He further stated, that the personal estate of the husband would not be sufficient to pay the debts. He stated receipts for

wife's estate for the benefit of her husband, where the equity of redemption has been reserved not to her, or her real representatives, but to her husband, or others. "It is the more important, as settling a most weighty distinction, by reference to the highest judicial authority in these realms — the House of Lords — which tribunal overruled a decision even of Lord Eldon C. in *Innes v. Jackson*, 16 Ves. 356. The distinction seems to be this, as stated in 1 Roper (ubi supra), p. 161; that, as on the one hand, the mere reservation of the equity of redemption to the husband will not change the wife's interest, so as to prevent her, or her heirs, from a title to redeem; so it is otherwise, where the limitations in the deed are distinct from the transaction of the mortgage. The case of *Jackson v. Innes*, upon the Appeal in the House of Lords, has been lately published at length by Mr. Bligh, Rep. Dom. Proc. 1 vol. 104, et seq., wherein the dignified candor of Lord Eldon (whose decree was overruled) seems well worthy of remark. That noble Lord observes (ibid. p. 135); "The circumstances of this case are certainly, in point of fact, much better understood than they were, and much greater research has been made into cases, so as to bring before the consideration of the House the true principle of decision. The Court below did not rightly apprehend the case as it now appears. The judgment of this House will remove a difficulty which I know is floating in the minds of many persons. I conceive it to have been the opinion of Lord Thurlow, that, in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary there should be, in the recitals of the instrument, some expression that the parties meant it so: that it was not enough to collect the intention from the limitations; but that there must be something more upon the face of the deed, to lead the wife to understand what those limitations were. It does, however, occur to me, on looking into the cases which have been referred to, that such a proposition cannot be supported, and, therefore, I am of opinion, that the decree must be reversed."

the annuity, and that, upon settling some accounts, the matter respecting the mortgage had been fully entered into, and the disagreeable situation of the devisee stated, on account of his paying more than the rent of the estate in annuities; on which occasion, the plaintiff had admitted, that it was agreed between her and her husband, that the 1500*l.* should be paid out of the estate charged therewith; and that she had agreed to sell the same for that purpose; but that, since his death, she had been advised to claim the 1500*l.* from his assets, but had relinquished that idea, and did not desire it, and promised to discharge the same, and accept the provision made for her by her husband's will, and requested the defendant to pay the legacies given under the will, and pressed him to sell the estate for that purpose; and the plaintiff paid the mortgagee the interest of the 1500*l.*

The defendant, Hooper, dying, after he had put in his answer, the bill was revived against his executors.

Mr. *Mansfield*, for the plaintiff, insisted, that this case was within the general rule, that where the wife's inheritance is mortgaged for the debt of the husband, she shall be a creditor upon the husband's assets [*203] to the amount; and that, in this case, *the previous surrender had made no difference, but the estate still continued to be the inheritance of the wife.

Mr. *Solicitor-General*, Mr. *Lloyd*, and Mr. *Richards*, for the defendants, contended, that, under the circumstances of this case, the bill ought to be dismissed. They admitted the general rule, that where the husband and wife borrow money, on the security of the wife's estate, although her estate is, by law, first liable, yet in a court of equity it ought to be disincumbered by the assets of the husband; but that this was a right that might be repelled by circumstances. That, in this case, the estate was not the estate of the wife; there had been a surrender to the husband and wife; under which surrender, though other persons would have taken as joint-tenants, a husband and wife took by entireties. That, in fact, the husband borrowed upon his own estate. That, suppose it the estate of the wife, she had agreed to its being made liable; which was a gift to the husband. If they had sold the estate, the money would have belonged to the husband: and they would have sold it if they could have found a purchaser. She has shown, by her own act, that she meant it to be a gift. It is not necessary, to prove an agreement between husband and wife for such a purpose, that it should be in writing. There is a case in Cowper (*Goodright v. Straphan*, Cowp. 201), where, a lease being made by husband and wife, the wife, having received rent after death of the husband, was presumed to have reexecuted the lease. Here, she has relinquished the claim, and has permitted the executor to go on borrowing money to pay the husband's debts. In *Lewis v. Nangle*, Ambl. 150, 2 Cox's P. Wms. 664, note, the Court would not decree the wife's estate to be indemnified. It should be referred to the Master whether it is to be considered as a loan, or a bounty. *Parteriche v. Poulet*, 2 Atk. 383.

Mr. *Mansfield*, in reply.—The question is, whether there is anything in the present case to take it out of the rule, which is established in *Tate v. Austin*, 1 Williams, 264, and supported by *Lewis v. Nangle*; that, where a woman pledges her estate for her husband, she shall be a creditor for the money. There is no case that any agreement, or anything short of what appears in the deed, shall prevent her from being a creditor. The rule was not applied in *Lewis v. Nangle*, because the debt was [*204] originally *the debt of the wife. The case in the Court of King's

Bench (*Goodright v. Straphan*) has always been doubted, and is directly contrary to a case of *Drybutter v. Bartholomew*, 2 Wms. 127; and the only case mentioned in Cowper, to support the rule, is a mistaken application of Perkins, 154. *Parteriche v. Powlet* is not applicable to the present case. There is no case in the books where it is put upon an agreement with the husband. If there ever was a case where the wife ought not to be bound, it is this; it is in proof, that the husband received 4000*l.* by the sale of the other part of the wife's estate, and that the husband promised to settle the new-purchased estate upon her. For two or three years she paid the interest: but if she had not, the mortgagee would have taken his remedy, and turned her out of possession; so that the payment of the interest can have little weight in showing her intention. And the conversation amounts to nothing like an agreement to waive the advantage she had from her estate being only mortgaged. At the time of that conversation the legacies were paid, so that the conversation did not induce the executor to pay them. Nothing short of an explicit agreement ought to preclude her from her right.

LORD CHANCELLOR. There is no doubt of the existence of the rule; but the question is, whether it is more than an inference to be drawn from the transaction, that the wife means to be repaid. If so, the consequence will be, that it may be rebutted by parol evidence, to show that the wife meant her estate to be liable. I had a doubt at first, as to the admissibility of parol evidence: but it seems to have been Lord Hardwicke's idea, that the case was the same as between principal and surety; in which case, the conversation would be admissible. In this case, the conversation was very strong. It is important to lay down the rule in such a manner that it will apply to other cases. I thought the rule was, that the wife had a right to stand in the place of the creditor; but if the evidence, in this case, is believed, Mrs. Clinton's demand must stand after the legacies. (3)

The cause stood over, and coming on again in this term,

Mr. Solicitor-General, Mr. Lloyd, and Mr. Richards, for the defendants, again argued that this case was not within the general rule; that the plaintiff did not stand in the light of a wife *who has suffered [*205] her husband to borrow money on the security of her estate; that this was indeed originally the estate of the wife, but was afterwards settled to the use of herself and her husband, as tenants in fee. At the time of the mortgage, the husband was extremely anxious to have the estate sold, with a view of applying the purchase-money in part payment of the value of the other estate he was then about buying; but, instead of selling the estate, it was agreed that it should be mortgaged for 1500*l.*, to be applied to that purpose. That it was a clear inference from this circumstance, that she meant to make him a present of this money. The same was also clearly the intent on the part of the husband; by his will, he has given her an annuity of 60*l.* a year, payable out of the estate purchased, charged his real estate with all his debts, except debts by mortgage, which shows he did not mean she should receive both provisions; because the expressions of his will cannot be satisfied, if this mortgage-money is paid to her; and such a claim as this may be rebutted by showing the intention of the parties. After the death of the testator, she distrained for an arrear of

(3) See, however, 1 Rep. Bar. & F. 142, which shows that the wife has, in some cases, a preference to the heir. It is observed, that, as against the heir, legatees are permitted to stand in the place of the mortgagee as well as creditors; but contra as to the wife; and Mr. Roper concludes that it arises from the inability he had noticed in the preceding page to affect her estate by circuitry.

the annuity, and an account was settled of what was due to her on that claim; and there is proof in the cause, of her declarations to the executor, that he might pay the debts and legacies. That she certainly was at liberty to waive her demand, and cannot now be at liberty to call for repayment of the money.

2. That parol evidence of her declarations is admissible. This is evidence to rebut a presumption or an equity. It does not contradict any instrument, or affect any property in the will. The deed binds the estate of the wife in point of law, but the rule in equity limits that right, and sees how the money has been applied. In the case of debtor and surety, it is necessary to show who is the surety, and who the debtor. Proof may be given, for the purpose of showing that it was not the intention of the surety to be considered merely as such, but as the principal debtor; and as it may be so between strangers, so it may between husband and wife, that he shall not be considered as the surety only. The Court has always examined as to the application of the money, and if there is no evidence of a gift from the wife to the husband, the wife is deemed the surety and

the husband the principal debtor, and his estate must pay the debt; [*206] but where the money has been applied for the benefit of both, *the

Court has said the rule did not apply. This was the case in *Lewis v. Nangle*, Ambl. 150, which shows, that, wherever the husband has applied the money to his own use, his estate must be liable; but that circumstances of presumption, and proof of such presumption, arising even subsequent to the borrowing of the money, will take it out of that rule; *Earl of Kinnoul v. Money*, which was a rehearing before Lord Camden, 18 and 21st of March, 1767. (a) In 1740, Miss Earnle, afterwards Lady Duplin, wife of Lord Duplin, son of the Earl of Kinnoul, seised in fee of estates of the value of 800*l.* per annum in possession, and of estates in reversion, expectant on the death of her mother, charged with debts upon her marriage with Lord Duplin, covenanted to settle her estates in trust to the following uses, viz.: To raise a term of 1000 years for payment of portions for younger children, then in trust for her husband as tenant for life; remainder to herself for life; remainder to uses which never took effect; remainder to herself in tail male; remainder to such uses as she should direct; remainder to herself in fee. There was no issue of the marriage, except one child, who died in its infancy, and Lady Duplin created a debt of 1000*l.* upon her estates by mortgage, in which Lord Duplin joined; and therein covenanted to pay the money so secured. In 1746, four thousand five hundred pounds more were borrowed on the security of the estates; and 2500*l.* having accrued due for interest on both sums, the mortgage was assigned over, and the estates pledged for the whole sum of 8000*l.* and interest, being the principal sums and interest due on the mortgage. Lady Duplin made her will, and charged her reverserary estate with the payment of her debts and legacies, and directed them to be paid by sale or mortgage of her estates; and, subject to the same, devised her estates to

(a) There are two very good reports of this case in Serjt. Hill's MSS. It came on originally before Lord Hardwicke, and not before Lord Northington, as erroneously stated above. It is reported by the name of *Lord Duplin v. Money*, 5 MSS. 597. Lord Hardwicke there stated the general rule (which Lord Camden afterwards declared to be as old as the Court itself), that where husband borrows money on the security of the wife's estate, as the money is under his power, it is supposed to come to his use; and this turns the proof on him to show the contrary. This Court *prima facie* considers it as a pledge for the husband's debts. And his estate shall be applied to exonerate it, unless a special case is made. The case is reported as it afterwards came on upon the rehearing, by the name of *Earl of Kinnoul v. Money*, 11 MSS. 141. — *Eden*.

Lord Duplin (afterwards Earl Kinnoul) for life, with power to make leases, then to two persons for their lives, and after the decease of the survivor of them, to the defendant, Money, in fee. Lady Duplin died in 1753, without issue. The bill was filed to have the 8000*l.* paid out of these estates; and it came on before Lord Hardwicke, who referred it to the Master for the purpose of inquiring into the appropriation of these sums so raised by mortgage, and reserved the consideration till the Master should have made his report. The question was between the devisees and heir-at-law, whether her estates were to be considered as well charged with these sums. It came on before *Lord Camden, when the point respecting the evidence of the appropriation was again raised, and his Lordship being of opinion, that Lord Hardwicke, by sending it to the Master, had decided that point, refused to hear the cause in that shape; and it coming on afterwards, upon a rehearing, Lord Camden observed, that the Earl of Kinnoul (who was the devisee) had filed the bill for the sale of so much of the estates as would pay off the debts and incumbrances, as well those of the plaintiff as those of the mother. The 2500*l.* was borrowed as the debt of the mother. It was plain, the 4500*l.*, except a small part of it, had been applied by Lord Kinnoul to his own use, and the 1000*l.* for interest. Lady Duplin had expressly devised her estates in possession, charged with her debts, and the estates in reversion, subject to the incumbrances: that where husband and wife raised money upon the wife's estate, this Court would inquire into the use of it, and, *quoad* the transaction, dissolve the marriage; that though the husband might afterwards give his bond, the application of the money determined who should be deemed the surety, and who the principal; and in equity it was to be considered that the surety came in aid of the principal debtor. That it was so in Lord Huntington's case, 2 Vern. 437; *Tate v. Austin*, 2 Vern. 689; 1 Wms. 264; and in *Pocock v. Lee*, 2 Vern. 604. That there was no case exactly in point, except *Lewis v. Nangle*, and that was a particular case, and no authority to govern other cases, unless circumstances were exactly similar; the money there was raised, not merely to pay the husband's debts. His Lordship said, he could see no reason why the Master should not make the inquiry; if otherwise, it would destroy the fundamental rule of distinction between principal and surety. As to the next question, Whether Lady Duplin's will made any alteration by the words *subject to debts and incumbrances*; these words infer no intention as to the equity between husband and wife, but merely as to the mortgagee; they must mean every incumbrance the wife was liable to. He must therefore say, she intended to lay the debt upon the estates in possession. From this decision it appears, that if she had declared expressly in her will, that she meant it to be a burden upon her estate, that must have made the trustees the principal debtors, and not the sureties. If that intention cannot be made manifest, without evidence, what objection can there be to parol evidence? It is nothing more than to repel the presumption of the wife's coming into Court, to *have her estate exonerated, upon the idea that [*208] the husband was the principal and original debtor; but if she was a mere stranger, then she would be the principal and not the surety; and, in such case, her intention to make it her debt would have turned the scale; and as such evidence must have been admitted as between strangers, why not as between husband and wife? Evidence of the application of the money may surely be as well determined in equity as at law, where parol evidence must be admitted, as the fact could not be got at without it. It would be against conscience that the husband should apply money so

raised for the use of the wife, and that, afterwards, his estate should be liable, because evidence of that fact cannot be admitted, and so it would in the case of a gift from the wife to the husband.

Lord CHANCELLOR observed, that in the case of *Lord Kinnoul v. Money*, the wife had a power of making a will; and the question was, whether by her will she had not made the estates liable.

Mr. Mansfield, and *Mr. Mitford*, for defendants.—This is a copyhold mortgage, and to be deemed a written instrument, consisting of the surrender in consideration of money to be paid to the husband. It is the contract of the husband, and any parol proof of the intention of the wife to contradict such contract, and to throw the debt on her estate, must be rejected, unless it is admitted on the ground of fraud or mistake. Her declarations during her coverture cannot be read, and those since her husband's death amount to nothing more than to authorize the executor to pay debts and legacies, but no implication of her intention to exonerate the husband's estate. If there had been any misrepresentation on her part, or any wilful act of hers to mislead the executor, and then to call upon him for the debt, that might have constituted a case of fraud; and, up to that extent, parol declarations might have been admitted; but simply as such, for beyond that extent she would not have been bound.

Lewis v. Nangle, and *Lord Kinnoul v. Money*, do not afford any inference as to the present case; as to the idea of principal and surety, there cannot be a presumption of the promise of a gift, both parties being jointly bound: where, therefore, the husband has executed the bond, and received the money, the presumption is at an end, and the wife must have a right.

[*209] *Lord CHANCELLOR. The equity does not consist entirely in the inference of the money being borrowed of the wife, and, therefore, being the debt of the husband, but with reference to its application; (b) so that if the question were, whether evidence should be received to show that the money was used for the benefit of the wife or her relations, it must be admitted; but the point here is, whether parol evidence can be admitted to prove that, at the time of the money being raised, it was the intention of the wife, that it should pass from her to the husband in the shape of a *gift*, for the purpose of buying other estates. It is, here, impossible to show that circumstance without resorting to parol evidence; and if it is to be rejected upon such slender grounds as the cases have gone upon, it would be impossible to administer justice upon these occasions with any effect; therefore I must admit it.

The evidence was read, and consisted of the answer of William Hooper, the executor, since deceased, by which he swore, that, in a conversation after the husband's decease, the plaintiff said, "that since her husband's decease she had been advised to claim the 1500*l.* from his assets, but that she had relinquished that idea, and did not now desire it, and promised to discharge the same herself, and accept the proviso made for her by her husband's will, or to that effect, and requested the defendant to pay all the legacies under her late husband's will, and pressed him much to sell the estates charged with the legacies, to raise money for that purpose:"—And

The deposition of William Harris, which stated that, in a conversation between them, the plaintiff told the deponent and Thomas Hooper, that Mr. Aston Harris advised her that she was entitled to have the 1500*l.*, and interest due on the mortgage, paid off from her husband's assets, but

(b) See 2 Phil. Ev. (Cowen and Hill's notes), 306, note 298, to page 156, pl. 15.

she did not mean to claim it, and hoped her cousin Hooper would go on paying the legacies.

Mr. *Mansfield* commented upon the evidence, and observed that it amounted to little more than common conversation; and as to what passed before the death of the husband, mere *parol* declarations of a married woman could not amount to a waiver, so as to do away her right; it says that the estate should be sold *for his benefit; but does she [*210] stipulate for any provision for herself out of it? But that part of the evidence is obviated by observing, that the estate never was sold, but only mortgaged, and the security still remains. There must be indisputable proof of a woman's barring herself of such a right, which is not a presumptive right, but as much an equitable one as any other arising in this Court. The disclaimer after the husband's death amounts to nothing; had it been intended as a fraud upon the executor, or if the executor, upon the faith of her never calling for this debt, had paid debts and legacies, it might have amounted to something, but the evidence here goes by no means to that extent.

LORD CHANCELLOR. Suppose the heir-at-law was to declare to the executor, that he would not press him for payment of the debt, and, upon that assurance, the executor was to proceed in payment of the legacies, such *parol* declarations would be sufficient to bar the heir from coming into this Court for payment of the debt; and my opinion is, that the case of the wife is *in toto* the case of the heir.

As to the right of the wife, upon consideration of all the cases on this head,—The earliest case is 1 Vern. 41, *Reason v. Sacheverel*, which amounts to this, that the wife's land was the security; and the husband having joined in mortgaging the estate for 400*l.*, paid off a part of the principal, and borrowed of the mortgagee the like sum; the Court held the wife's estate was liable to pay the whole. In giving that opinion, no point arose, how far the assets of the husband should have exonerated the estate; but the effect of it seems to have been, that, from the moment the wife mortgaged the estate, it was in the power of the husband, independent of that mortgage, to charge it with a further sum; and the case there is, that she, having charged the estate with 400*l.* originally, and that sum having been paid off, and another borrowed upon the same security, it was held not to be the immediate debt of her husband; and no case has yet been decided, that where the husband and wife join in mortgaging, the husband shall, by his own interposition, charge his estate. In the case of *Grey v. Kentish*, 1 Atk. 280, the question was, whether a possibility of the wife could be assigned by the husband, as a security for his debt; and the point was between the assignees of a bankrupt *and [*211] his wife. Lord Hardwicke, in considering the nature of the right of the husband, observed, that if the husband had paid off the debt, it would have been the wife's by survivorship, being in the nature of a pledge; and had he died without paying it off, she would have been entitled to have had the estate disincumbered. The rule is this, that the title of the wife to be exonerated is precisely the same with that of the heir. In 1 P. Wms. 264, and 2 Vern. 689, *Tate v. Austin*, though it was not the question in the cause, and consequently the judgment of the Court did not appear to have been weighed in argument, yet the Court declared that, clearly, the wife could not insist upon being paid against onerous creditors, but would be postponed to such creditors; and that the debt, being originally the debt of the husband, his personal assets were bound to pay it in the first instance, and she entitled to have her estate so exonerated, not upon any right she might have, but upon the idea of its being the

husband's debt; and such is the reasoning in 1 P. Wms. 347, *Bagot v. Oughton*, where the wife's estate was mortgaged before marriage, and the husband, subsequent to it, joined in a fine for confirming the title; there the Court held, that, as it was not the husband's debt originally, his assets were not liable; that he should not be bound by his covenant, which was subsequent to the debt, and not to be deemed an absolute covenant, but merely collateral to the debt which existed before, and consequently remained *in statu quo*. So *Evelyn v. Evelyn*, 2 P. Wms. 659, which seems to have determined the point between heirs and executors. How was it then in *Lewis v. Nangle* (which is but confusedly taken), (4) and *Lord Kinnoul v. Money*? The former case seems to be more clearly reported in Mr. Joddrel's notes; and the question seems to have turned upon the circumstance of the money having been borrowed at the time the settlement was made; and Lord Hardwicke thought that it was part of the contract made with the wife, that it applied to the mortgage, and that he could, in that case, make no distinction between the one contract and the other. *Lord Kinnoul v. Money*, which was said to be like *Lewis v. Nangle*, was in that respect different; for there Lady Duplin had a real estate, subject to charges to a certain extent, (5) and the estates of the mother were also subject to several demands. The agreement to mortgage that estate for 2000*l.* made it the debt of the ancestor, particularly charged upon the estate; and when it was [*212] settled in strict settlement, after several limitations, and the terms which expired then by there being no issue living, she had a power to appoint during her coverture. Some time after the marriage, a sum of money was raised for the benefit of Lord Kinnoul (then Lord Duplin), and there being the sum of 1000*l.* due, with interest thereon, at length the estate was mortgaged for the sum so borrowed; which, together with the original mortgage debt, made up 8000*l.*; and, in the mortgage deed, it was expressed to be done by virtue of the power. Upon the inquiry directed by Lord Hardwicke, before the Master, it turned out to have been applied to the use of the husband. In 1767, upon the rehearing before Lord Camden, it was contended that the reference to the Master was wrong, and that there ought to have been an immediate decree, and the whole charged upon the estate of the wife, the bill having been brought by Lord Kinnoul to have the estate sold; but that could not be done without the consent of the other parties. Lord Camden affirmed the decree *in omnibus*, and argued that Lord Hardwicke's opinion was right, for that the wife's estate should not be subject to any other charge than her own debt; that *Lewis v. Nangle* turned upon different circumstances, for the distinction there consisted in its being a debt upon a previous consideration, and went upon that peculiarity, and not upon general principles. This affirmation of Lord Hardwicke's decree furnishes a position not directly in point in that case, but which ought to have been raised, that it is not necessary it should appear upon the face of the deed to lead the uses of the fine; that the debt was the debt of the wife, but may be proved to be so *aliunde*. So in *Bagot v. Oughton*; for it is clear that the instrument was not a declaration to that effect. In *Lord Kinnoul v. Money*, it appears that the money was, as to part of the sum raised, in

(4) Vide *Lewis and Nangle*, from Reg. Lib. in Mr. Cox's note to *Evelyn v. Evelyn*, 2 P. W. 664.

(5) Mr. Roper (1 vol. p. 145, et seq.) seems to reconcile the cases of *Lewis v. Nangle* and *Lord Kinnoul v. Money* upon this distinction, viz. "that if part only of the money raised on her estate be her husband's debt, to that extent her right of exoneration attaches. But when the security can be connected with the contract for settling the wife's estate upon marriage, there the wife will not be entitled to exoneration."

fact, for payment of the debt of the wife, and that it never was the debt of the husband; for if it ever had been so, he would have been bound to pay it out of his personal assets; but the circumstance of his covenant to pay the debt, it not being his own, could not make it his; because such covenant might be otherwise explained, as being merely a further security, without altering the quality of the debt itself; and the true reason is in *Evelyn v. Evelyn*; for there the husband covenanted for a debt contracted by another party, and his covenant was not deemed as binding his own estate, or making it his personal debt. If, in *Lord Kinnoul v.*

**Money*, parol evidence might be given to show, that the debt [*213] which the husband covenanted to pay was not his own debt, but the debt of another, and, consequently, that the husband should not be charged with that debt; if it were *res integra*, it might be thought a right thing to say, that where the wife, upon the face of the transaction, appears to have subjected her estate to the debt of the husband, there should be an inference in favor of the wife, that, on the part of the husband, it was a contract also to make her a *feme sole*, for the purpose of coming into equity for the payment of it. As to Lord Camden's observation, that the marriage was dissolved *quoad* the transaction, that, perhaps, is merely figurative, as I know of no case to that extent; and the cases of *Tate v. Austin*, *Lewis v. Nangle*, and *Lord Kinnoul v. Money*, go upon the idea of an equitable *assumpsit*. Where it has been clearly proved that the money borrowed had been paid into the hands of the wife, and that she had been perfect mistress, and had converted it to her own use, as her separate money, there can be no reason why the Court should not declare that it was so applied, and consequently could not be deemed the debt of the husband, and the covenant of the husband was merely a necessary covenant for the purpose of confirming the debt. So where the wife, having the absolute disposal of it, appropriates it to the use of her husband, that fact would reach the original contract, but still resolves itself into the same principle as before, and makes her estate liable. Now, as to admitting parol evidence, I confess, in giving my opinion before, as to the admissibility of parol evidence, it was too extensively given: the case, as it is stated, without parol evidence to the contrary, is the case of a wife having subjected her estate to the debt of her husband, by joining in a mortgage of her estate. The allegation is the same as in *Tate v. Austin*, that it was meant as a gift; but there it was a vain allegation, and not allowed. If so, it stands thus, that she suffered a sum of money to be raised upon her estate: if this had been by fine, and a trust declared to raise 1500*l.* by sale or mortgage, for the benefit of the husband, it would have been manifestly never the debt of the husband, but a sum of money which, by the terms of the contract, he was entitled to, and so much raised out of the inheritance of the estate. But where it is alleged to be a transaction, purporting (not only upon the terms of the instrument, but by other evidence) to raise a sum *of money for pay- [*214] ment of his debts, was it possible to give parol evidence applicable to the transaction itself, so as to prove that it was for a different purpose, and must have a different effect from that which the instrument purported, as that the wife's debts had been paid by it, and the application had been different from what was in the original contemplation of the parties, such parol declarations must be admitted to that extent; and there could be no reason for rejecting it: (c) but when I thought that the evi-

(c) See 2 Phil. Ev. (Cowen and Hill's notes) 306, note, 298 to page 156, Pl. 15; Ram on Assets, ch. 29, § 1, p. 264.

dence offered in this case, of the conversation prior to the husband's death, ought to be admitted, I went beyond the cases; for all the authorities are where the fact has been established of the money being actually paid to another account, and, consequently, considered as never borrowed by the husband, because never received by him. But to say evidence should be admitted to show the wife's consent that the money should be his, as attempted here, would be carrying the rule of evidence too far; and if it stood upon that case, the wife ought to have the estate exonerated out of the personal assets of her husband. But I cannot distinguish this case from the case of the heir; for if the heir will tell the executor to pay the legacies, and that he will not press him for the exoneration of his estate, and the executor pays upon that assurance, the executor shall not be called upon afterwards, or the legatees be obliged to refund. It would be contrary to the rules of equity to say, that the heir should not be barred, by such a concession, from his claim; it would be countenancing, as it were, a mere fraud upon the executor, if the heir was allowed to call upon him after such a disclaimer. In this case, she has, by her declarations to the executor, clearly disclaimed her right; and I do not think it material whether the legatee were paid before or after this concession; therefore, the bill must be (d)

Dismissed. (6)

(s) Without costs, as against all the defendants, but the mortgagees. — R. L.

(d) See Clancy, Rights of Women (Am. ed.), 600, et seq.

As to the rights of the wife, to have her estate exonerated in cases where it has been pledged for her husband's debts, or to stand in place of a creditor or surety in respect to the debt for which the pledge was given, see 2 Story, Eq. Jur. ch. 37, § 1273; 2 Phil. Ev. (Cowen and Hill's notes) 306, note, 298 to page 156, Pl. 15, and cases cited; Clancy, Rights of Women, ch. 12, p. 589, et seq.; Ram on Assets, ch. 29, § 1, p. 363, 364; ante, 201, note (1).

SEAL v. BROWNTON [BRAUNSTON.]

(Reg. Lib. 1790. A. fol. 80.)

Bill of heir-at-law against devisee, where vexatious, dismissed with costs.

BILL filed by the heir-at-law, against the devisee, for an account of rents and profits.

[*215] *An issue *devisavit vel non*, had been directed at the hearing.

Upon the trial, a verdict was given for the defendant.

Upon the cause coming on for further directions, the heir not appearing, the only question was as to costs.

Mr. Mansfield said, the rule was, that where an heir was made defendant, he must have his costs; but where he is plaintiff, and files a long bill to harass the devisee, he shall pay costs.

Lord CHANCELLOR dismissed the plaintiff's bill, with costs. (a)

(a) So in *Luxton v. Stephens*, 3 P. W. 373, it was said, that where an heir-at-law is plaintiff, and miscarries in his suit, he shall not have costs, but, on his suit appearing to be groundless, shall pay costs. And, in general, where the heir comes into equity instead of bringing an ejectment (though it is discretionary in the Court), costs will be given against him. *Leman v. Alie*, Amb. 163; *Blinkhorne v. Feast*, 1 Dick. 153; *Johnson v. Gardiner*, ib. 313; *Gough v. Botevel*, ib. 396; *Beaumont v. Whiton*, cit. ib. But where he is brought into Court as a defendant, if it be to a bill by a deviser to perpetuate testimony, he shall have his costs, notwithstanding his having cross-examined the plaintiff's witnesses. *Bidulph v. Bidulph*, 2 P. W. 285; *Angell v. Brown*, cit. ib.; *Luxton v. Stephens*, sup.; *Humphrey v.*

Morse, 2 Atk. 408; Webb v. Claverden, ib. 424; Blinkhorne v. Feast, sup. But if he examine witnesses to encounter the will, he shall not have his costs. Berney v. Eyre, 3 Atk. 286; Blinkhorne v. Frast, sup. This is where the bill does not pray relief, or is not brought to a hearing. If it is, and he chooses to examine witnesses, the question of costs will depend upon the circumstances; Gough v. Botevel, sup.; Blinkhorne v. Feast, sup.; White v. Wilson, 13 Ves. 91. He has also a right to demand an issue, upon which he shall have his costs. Berney v. Eyre, sup.; White v. Wilson, sup., unless he sets up insanity, or any other disability against the person who made the will, and fails, in which case he shall not have his costs. ib.; Webb v. Claverden, sup. But it must be a very strong case to induce the Court to give costs against him, as spoliation, or secreting the will. Berney v. Eyre, sup.; vide also The Attorney-General v. The Haberdashers' Company, post, vol. iv. 178. — *Eden*.

ARMSTRONG v. ELDRIDGE.

(No Entry.)

Testator gave a residue to trustees to pay the interest to four persons for life, and after decease of the survivor, then to divide the principal among their children; two died; the interest shall be paid to the other two. Though the words "share and share alike," in a will, generally, create a tenancy in common, they cannot do so where there is an express jointtenancy. (1)

THE testator gave the residue of his real and personal estate to trustees, in trust to sell and apply the interest, proceeds, and profits thereof, from time to time, to the use of his grandchildren, Frances Armstrong, Charlotte Armstrong, Rebecca Armstrong, and Mary Armstrong, equally between them, share and share alike, for and during their several and respective natural lives; and from and immediately after the decease of the survivor of them, in trust to pay and apply the principal money, to, and among all and every, the children of his said grand-daughters, equally to be divided between them, share and share alike.

Two of the grand-daughters were now dead, leaving children. The question was, what should become of the interest which the two deceased grand-daughters took, until the death of the survivor. The children of the deceased grandchildren claimed them, their mothers being tenants in common, therefore, there being no survivorship.

But, Lord CHANCELLOR said, that though the words "equally to be divided," and "share and share alike," were, in general, construed, in a will, to create a tenancy in common, (a) yet, where the context shows a joint-tenancy to be intended, the words should be construed accordingly; and that, in this case, it was evident, that the interest was to be divided among four, while four were *alive; among three, while [*216] three were alive; and nothing was to go to the children, while any one of their mothers were living; and declared the whole interest to belong to the two living grand-daughters, by survivorship.

(1) And so in the converse; where words of jointtenancy are coupled with directions amounting to a division, there will be a tenancy in common. Vide Perkins v. Baynton, ante, 1 vol. 118, and the note. As to words of division constituting a clear tenancy in common, vide Joliffe v. East, ante, 25; Martin v. Wilson, postea, 324, and in Jenner v. Jenner, 10 Ves. 569. { See Bayard v. Smith, 14 Ves. 474; Scott v. Bargeman, 2 P. Wms. 68. }

(a) See Drayton v. Drayton, 1 Desaus. 329; Bunch v. Hurst, 3 Desaus. 288; Westcott v. Cady, 5 John. Ch. 334; Stewart v. Garnett, 3 Sim. 399.

A deed of an estate to two "jointly and severally" was held under the statute of Massachusetts of 1785, to create a tenancy in common. Miller v. Miller, 16 Mass. 61. See farther, on the creation of joint estates or estates in common, Joliffe v. East, ante, 27, and notes; Perkins v. Baynton, 1 Bro. C. C. 118, and notes.

Ex parte CATOR, in the Matter of WHITESIDE, a Bankrupt.

Charging a bankrupt in execution after the commission, is an election to proceed at law; and the creditor cannot afterwards proceed under commission. (1)

PETITION to be at liberty to prove a debt, the proof of which had been refused by the commissioners; the ground of refusal was, that the bankrupt had been charged in execution after the bankruptcy, and after he had obtained his certificate; that the debt was, therefore, discharged.

It was argued by Mr. *Solicitor-General*, and Mr. *Mitford*, that, although a creditor having a debtor in execution before the bankruptcy, will not prevent him from proving; yet, that charging him in execution after the commission, is such an election as the creditor must abide by; in law, he has been paid. A party cannot proceed against the goods, after the body is discharged by process of law. If a debtor dies in execution, the creditor may proceed against the goods; but that was in consequence of 21 Ja. 1, c. 4, so that it seems to require a positive act of Parliament. It is a particular indulgence, to permit a creditor to prove, when he has the bankrupt in execution before the commission; and that on the ground, that the law has taken from the bankrupt all his effects, with which he could pay the debt, to which the creditor probably looked; but after the commission, the creditor must know that there was nothing to choose between but the body and the commission.

LORD CHANCELLOR. I really think the taking in execution after the commission, is an election not to come in under the commission; and, having made this election, the creditor must abide by all the consequences of the certificate. He may assent to, or dissent from the certificate, in order to assist that legal remedy, but still he cannot receive any benefit from the commission.

[*217] *The matter stood over, and coming on again,

Mr *Mansfield* cited a case *ex parte Hichlin*, 2d Feb. 1785, where the creditor having taken the bankrupt in execution, after the commission, and having discharged him, still was not suffered to prove his debt, having taken the highest satisfaction the law knows. But at the same time, he contended it was reasonable, that whether he had taken him before or after the commission, he might still be at liberty to make an election to take a dividend; that commencing an action is not an election; and, if commencing is not so, why should proceeding be considered as such?

LORD CHANCELLOR said, the right way was, for the creditor to apply for leave to prove, in order to assent to, or dissent from, the certificate. If the creditor has lost his debt by a blunder it is a pity, but he has made his election.

The bankrupt was discharged out of custody by compromise. (2)

(1) Vide S. P. *Ex parte Warder*, ante, 191, and the notes.

(2) Sir J. Simeon's notes state the petition was dismissed, 29th Jan. 1791.

HEATHCOTE v. MAINWARING. Rolls, 1st Feb.

A real composition cannot be established without showing the deed by which it was created, or proving its existence.

In this case it was stated by *Mr. Lloyd*, and admitted by the counsel for the defendant, that, in the cases of *Robinson v. Appleton*, (1) and in *Hawes v. Swain*, (2) Exchequer sittings after Trinity 1789, it was settled, that a real composition could not be established without showing the deed by which it was created, or proving the actual existence of such a deed; (a) for, otherwise, every bad *modus* would be set up as a real composition; and there would be no line drawn between them. And the Master of the Rolls agreed this to be so.

(1) *Robinson v. Appleton*, 4 Wood's Tithe Cas. 10, and 3 Gwill. 1161.

(2) 4 Wood, T. Ca. 313, and 2 Cox, 179.

(a) The doctrine upon this subject was very ably stated in the elaborate arguments of the majority of the judges, who delivered their opinions in the House of Lords, in the case of *Knight v. Halsey*, 2 B. & P. 206, et seq. It seems to have been invariably holden, that some evidence must be adduced to show that such an agreement, though lost, did once exist, vide the passage from the Year Book, 34 H. 6, 36, there cited. *Rotheram v. Fanshaw*, 3 Atk. 698; *Bennet v. Neale*, Wightw. 324; *Chatfield v. Fryer*, 1 Price, 253. Therefore, in the case of *Sawbridge v. Benton*, 2 Anstr. 37, where instruments were given in evidence, which strongly denoted that such an agreement must have taken place, as they related, with a reasonable degree of probability, more particularly to such a transaction than to any other, the real composition was supported; vide also the observations of *Eyre, C. J.*, in *Bolton v. The Bishop of Carlisle*, 2 H. Bl. 263.

The doctrine upon the subject of exemption from payment of tithes, which is similar to the above, is contained in the luminous judgment of Lord Northington in *Fanshaw v. Rotheram*, printed from his Lordship's MSS., 1 Eden, 376. The subsequent decisions, which are numerous, are collected in the Editor's note to it. — *Eden*.

GREEN v. LOWES.

(Reg. Lib. 1790. A fol. 145. b.)

Injunction against purchaser on behalf of creditor to restrain payment to heir. (1)

BILL by creditors against the executor, heir, and purchaser of a real estate charged for payment of debts.

**Mr. Stanley* moved for an injunction on the purchaser of the [*218] estate, which had descended on the heir, to restrain him from paying the purchase-money to the heir.

There was an affidavit that there was little, if any, other fund for payment of the debts, besides this estate.

The defendant had not answered, but had obtained orders for time.

Injunction ordered, till answer, or (2) further order. (a)

(1) If, however, a purchaser pays his money without notice of the debts, he is safe both against the heir-at-law and devisee. Vide Sugden, Vend. & Purch. 435, note, and *Mathews v. Jones*, 2 Anstr. 506, there cited. See further, as to purchasers, *Smith v. Guyon*, ante, 1 vol. 186, with the notes, and *Williamson v. Curtis*, ante, 96.

(2) "And" further order. — R. L.

(a) See 3 Sugden, Vend. & Purch. (6th Am. ed.) 97 [153]; *Eden on Injunct.* (2d ed.) 240, 341; 2 Story, Eq. Jur. ch. 23, § 907, § 954; *Hawkshaw v. Parkins*, 2 Swanst. 549; *Hine v. Handy*, 1 John. Ch. 6; *Reeve v. Parkins*, 2 Jac. & Walk. 390.

ATKINSON v. LEONARD.

(Reg. Lib. 1790. A. fol. 222.)

Writ of *ne exeat regno* obtained by one inhabitant of Antigua, against another [casually in this country,] (1) upon a bond stated in the bill to be lost, discharged, on giving security to abide by the decree. Writ of *ne exeat* must be upon an equitable demand. Though a court of law will permit a plaintiff to declare upon a lost bond, that does not oust the concurrent jurisdiction of this Court. (2)

MOTION to discharge a writ of *ne exeat regno*, obtained against the defendant. The affidavit made by the plaintiff, upon which the writ was obtained, stated, that the plaintiff, who lived in Antigua, had formed an intimacy with the defendant, who then lived in the same island; that in the year 1765, the defendant being embarrassed in his circumstances, the plaintiff had assisted him, by paying off some debts, and becoming security for others, and continued so to do till the year 1768; when other creditors of the defendant, to whom he had given bonds, with warrants of attorney to confess judgment thereon, becoming pressing for their demands, and having entered up their judgments, the plaintiff made out, and furnished the defendant with, an account of moneys, by him advanced and paid for the defendant; requesting him to give the plaintiff a bond and warrant of attorney to confess judgment, to put him on the same footing with the other creditors; and the defendant, in the month of May, 1768, accordingly, gave the plaintiff his bond and warrant of attorney, for securing to the plaintiff the balance due to him on the said account, with interest at 6l. per cent. Which balance, to the best of the plaintiff's recollection and belief, amounted to 800l., current money of Antigua, equal to 450l. sterling. The affidavit farther stated, that, in the year 1766, a treaty of marriage took place between the plaintiff and his wife, the defendant's sister, and a treaty with the defendant's father, for that purpose, [*219] who promised to *enter into a bond, for securing 600l., as part of the daughter's portion; that the plaintiff came from Dominica to England, leaving his wife and her mother in the care of his house; and, in the plaintiff's absence, the defendant made a visit to plaintiff's wife; that, soon after the plaintiff's return to Dominica, and wanting money, he found it necessary to press the defendant for the money, secured by the bond and warrant of attorney; that on searching his bureau, where he used to keep the said bond and warrant of attorney, he discovered that they, together with other papers, had been taken away, and he had never since been able to find the same; that the father of the defendant, and plaintiff's wife, dying in January, 1783, intestate, leaving defendant and plaintiff's wife, his only children, and his widow, surviving him, his next of kin, and entitled to his personal estate; and the widow soon after dying, and leaving the defendant and plaintiff's wife her next of kin, and the father dying possessed of about 1950l. currency, equal to about 1100l. sterling, and the mother being possessed of about 550l. sterling, the plaintiff

(1) Vide S. P. 1 Ves. & Beames, 129, 132, 133; and see further per Lord Eldon, C., in approbation of the principle, in *Etches v. Lance*, 7 Ves. 418, though his Lordship said the principal case was a most distressing one. *Stuart v. Graham*, 19 Ves. 315. Upon the subject generally, &c. see Mr. Beames's Treat. on Ne Ex. pp. 30, 38, 44, 47, 50. *Hyde v. Whitefield*, 19 Ves. 342, &c. < See also *Woodward v. Schatzell*, 3 John. Ch. 412; *Mitchell v. Bunch*, 2 Paige, 606, 617 - 620; 2 Story, Eq. Jur. ch. 41, § 1474, and note at the end of that section; *De Carriere v. De Calonne*, 4 Ves. 577; *Roddam v. Hetherington*, 5 Ves. 91; *Dick v. Swinton*, 1 Ves. & Bea. 371. >

(2) See likewise per Lord Eldon, C., *Ex parte Greenway*, 6 Ves. 812, 813; *Bromley v. Holland*, 7 Ves. 19, 20; *E. I. Co. v. Boddam*, 9 Ves. 456, &c. &c.

claimed, in right of his wife, one moiety of those sums. The affidavit further stated, that about June, 1789, the defendant's wife being in a bad state of health, the defendant, together with his wife, came to England, for medical advice, and arrived in England in July following; and the plaintiff following him, arrived in England soon after him; and, upon various applications to the defendant, having been able only to obtain the payment of 10*l.*, on account of his demands, and the defendant intending shortly to return to Tortola; the plaintiff had filed his bill for the recovery of his demands. "Saith, that there is now justly due, and owing, from the said defendant to this deponent, upon, or by virtue of, the said bond and warrant of attorney, the sum of 900*l.* sterling; and he verily believes, that upon the taking the account of the estates of the defendant's father and mother, possessed by defendant, there would appear to be due to plaintiff and his wife, for their distributive share, 550*l.*, besides interest:" and the plaintiff further said that he was in Tortola when the defendant came to England, and understood, that his whole business was to attend his wife, for advice, who died in November last; and the defendant intended to return (about Christmas last) to Tortola: and, that if the defendant was permitted to leave the kingdom, without giving security to answer plaintiff's demands, he verily believed he should be in great danger of losing the same. When *this application was made to the Lord [*220 Chancellor, for a writ of *ne exeat regno*, against the defendant, his Lordship thought, that the plaintiff had laid a sufficient ground for the writ, with respect to the money lent and advanced for the plaintiff, but not to the extent of his demand in right of his wife, to a moiety of the personal estate of the defendant's father and mother; and, therefore, by his order of the 29th November, 1790, directed the writ to be marked for 900*l.*

Upon this writ, the defendant was arrested, and gave bail; and put in his answer to the plaintiff's bill, admitting the execution of the bond and warrant of attorney, but stating claims upon the plaintiff; and, in particular, denying that anything was due to him in right of his wife, from the estate of defendant's father and mother; they not having left sufficient property to discharge their debts.

Mr. *Solicitor-General*, supported by Mr. *Mansfield* and Mr. *Steele*, now moved, that the writ of *ne exeat regno* might be discharged, and the defendant discharged out of custody.

They argued this on several grounds; 1st. It was a writ of *ne exeat regno*, to restrain a man from returning to his own country, from whence he came with the plaintiff's knowledge, and for a legal purpose, the having proper medical advice for his wife, not for the purpose of avoiding process; and the bill was only filed when the defendant was just going home, though the plaintiff had been a considerable length of time in this country. This was originally a prerogative process, and has been only extended to the subject in cases where the defendant was leaving the kingdom for the purpose of avoiding the process of the Court, Pract. Reg. 251. That cannot be the case, where the party is going home to the same country, which is the country of the plaintiff, where all the accounts are, and where the same justice may had be as here. In *Robertson v. Wilkie*, Amb. 177, the case is not stated, but it appears to be a writ to restrain the defendant from returning to Minorca; and the reason why Lord Hardwicke ordered security to be given, was, that there was no faith between the parties, as to having justice where they resided, as there is between persons living in the English colonies. Lord Northington refused a writ of *ne exeat*, on this very ground. *Secondly, this is a mere legal debt, [*221]

for which the plaintiff might hold the defendant to bail; and, therefore, is not entitled to this process, which must be upon a debt of merely an equitable nature, 2 Atk. 210. Then what is the nature of this demand? The plaintiff does not swear positively to one shilling being due. It is only, that he had been used to advance money for the defendant, and had given security for his debts; that he desired him to give him a security equal to that he had given his other creditors; and, that the defendant gave him a bond and warrant of attorney to confess judgment for the balance, which amounted to 800*l.* currency, equal to about 400*l.*, to the plaintiff's recollection and belief. If the security required by this warrant be in analogy to bail, this manner of swearing would not be sufficient to hold a defendant to bail; the sum must be positively sworn to. The plaintiff says, afterwards, that there is now 900*l.* due to him; which, standing by itself, is positive; but is here manifestly founded on the balance; so that it is impossible the plaintiff can be positive as to his debt, and cannot make that sort of affidavit which is necessary to restrain the defendant from going home. If 900*l.* is due, it is a legal debt; but the bond and warrant of attorney, being money to secure a balance, does not alter the nature of the original debt. Not like a bond for a certain sum, which shows the nature of the contract. The defendant swears, in his answer, it was only for the balance. But it will be objected, that the bond and warrant of attorney being lost, makes it an equitable demand. Notwithstanding this, the defendant might have been held to bail. In *Reed v. Brookman*, 3 Term Reports, 151, a deed of release was pleaded as lost, and allowed.

Mr. *Le Mesurier*, as *amicus curiæ*, stated a case of *Totty v. Nesbit*, in B. R. Trin. 24 Geo. 3 (cited 3 Term Rep. 153, note), where an action was brought on a bond as an existing instrument, and profert made: the defendant prayedoyer: Peckham moved for the plaintiff to dispense with theoyer, on account of the original bond being lost, upon giving a copy of it; *Buller J.* said that they might have declared on the bond as lost; and the Court gave the plaintiff † leave to alter the declaration.

[*222] *Mr *Lloyd*, and Mr. *King*, for the plaintiff. Nobody can read the affidavit without being satisfied of the money being due: the defendant admits giving the bond, but only says, generally, that there is not so large a balance due. We admit that, in order to authorize the issuing of this process, the demand must be an equitable demand; but the affidavits must be positive, and the persons proper objects of the application. 1st. With respect to its being an equitable demand: wherever a man has lost his bond, he may come for a remedy into a court of equity; no action has ever been supported on a lost bond. If there are any declarations of that sort, they are not those of the whole Court. In the case in the Term Reports, *Grose, J.* differed: that case was a distress for a rent-charge, to which a release was pleaded, which had been lost, and it was so pleaded for the sake of the Court's presuming the release, where the rent-charge had not been demanded for a great length of time. In *Whitfield v. Fausset*, 1 Ves. 387, Lord Hardwicke says, the loss of a deed is not always a ground to come into a court of equity; but if a man has lost a bond, he is entitled to come into a court of equity, because he cannot declare without making profert, the defendant being entitled tooyer; and he cited several cases, which are mentioned at the end of the report. So *Walmsley v. Child*, 1 Vesey 341. As no cases are cited to the contrary, your Lord-

† The bond had been destroyed by the defendant.

ship will not say this is a legal demand. As to the affidavit being positive, it has been laid down, that where the demand was for an account, and the plaintiffs swore, that they verily believed a certain sum was due, the writ was issued; the plaintiffs were the next of kin of a testator. Mr. Solicitor-General has said that the defendant came here for a particular purpose, and made no application till he was just setting off upon his return. The affidavit states, that demands had been made in the West Indies. The defendant came hither in 1788, his wife died in 1789, yet he continues to stay here. It is not sufficient to say, that both the plaintiff and defendant lived in the islands. The case in Ambler does not state the circumstances, and does not apply to this case: it did not proceed on the ground of the parties being abroad. In a case of *Collingridge v. Monk*, in 1766, the defendant was usually resident in Jamaica, and only occasionally resident here, yet the writ was granted. If I lend money to a man on his bond, he is my debtor, wherever he goes. It is said, it is hard to make him account here, but there is no doubt the *ac- [*223] count must go on: the only question is, whether we shall have a security to obey the decree when made.

Mr. *Solicitor-General*, in reply. The very case determined in the Court of King's Bench is put by Lord Hardwicke, in the case cited. Consider what sort of equality would be put between the plaintiff and defendant, by the doctrine now held. The defendant might plead a release, lost by time and accident, but the plaintiff, who had lost his bond, could have no benefit. In the case mentioned, of *Totty v. Nesbit*, it was a bond declared upon, with a *profert*; the declaration was afterwards amended, and, upon the trial, the loss of the bond was proved, and a notorial copy produced, upon which the plaintiff recovered. Therefore, the plaintiff has a remedy at law, and, in such case, the Court will not usually grant a writ of *ne exeat*. This is not a writ sued out of course; a case must always be established for it. The defendant, by his answer, swears positively, that the plaintiff, on the balance of accounts, was indebted to him. No account is given for the delay in filing the bill; although the plaintiff has stated that he came hither to enforce his demand against the defendant. There are courts of judicature in the islands, where the papers and other evidences are, which are competent to decide between the parties.

Lord CHANCELLOR. The real question is, whether there is a sufficient equitable demand to sustain this equitable process. I should be sorry a process should depend on so precarious circumstances as those stated. The case in Ambler did not go to the length now urged; the Court thought he must give security to the extent of the demand. Lord Hardwicke is there made to take a difference between the English law, as administered at Gibraltar, and the Spanish law at Minorca. In both cases justice would be equally certain. Lord Northington thought the process ought not to be extended to foreigners; that could only apply where the justice of the case would be equally certain to be done. When the question is only between a *ne exeat regno*, and taking security, I easily lean to the latter; because, beyond securing the demand, I think there is no reason for the *ne exeat*. (3) The justice of the Court being satisfied, I think it would be better to abandon the process, than to apply

(3) See the references in note (1), *antea*.

it where the purpose can be answered by giving security: it should be used only to compel the party to abide by the justice of the case. (a) [*224] *I shall not contradict the case in the King's Bench (*Totty v. Nesbit*) being law; but the question is, whether this Court is ousted of its jurisdiction, so that a demurrer would lie to a bill, for a lost bond, and it must be dismissed: I thought there had not been any such way of declaring, but there must be a *profert*; but, as it is, there must be proof of the bond's having had existence and being lost. (b) But it does not follow, because the court of law will give relief, that this court loses the concurrent jurisdiction which it has always had: and till the law is clear upon the subject, the Court would not do justice in refusing to entertain the jurisdiction. (4) (c)

Therefore the writ must be discharged, on giving such security as the Master shall think proper, to pay what shall be found due upon the account. (5) (d)

(4) See the references in note (2), *ante*.

(5) The order directed security to be given to answer the plaintiff's demands to the extent of 2500*l.*, if so much should ultimately be found due from him to the plaintiff. — R. L.

(a) 2 Story, Eq. Jur. ch. 41, § 1470, § 1471, § 1472, § 1473, § 1474, § 1475; Seymour v. Hazard, 1 John. Ch. 1; Flack v. Holme, 1 Jac. & Walk. 405, 413, 414; Jenkins v. Parkinson, 2 Mylne & Keen, 5; Wyatt's Prac. Reg. 289; Beames on Ne Exeat, p. 26-28; Blaydes v. Calvert, 2 Jac. & Walk. 211, 213; Smedberg v. Mark, 6 John. Ch. 138; Porter v. Spencer, 2 John. Ch. 169, 170; 1 Smith, Ch. Pr. (Am. ed.) ch. 18, p. 576, et seq.

This writ is in the nature of equitable bail, and will, accordingly, only be granted where the demand is of an equitable character, and not due or recoverable at law. Mitchell v. Bunch, 2 Paige, 606; Brown v. Haff, 5 Paige, 235; Seymour v. Hazard, and Smedberg v. Mark, *ubi supra*; De Rivaflinoli v. Corsetti, 4 Paige, 264; Graham on Juris. 577.

[Mr. Cox, in a valuable note to Duane's case, 1 P. W. 262, notices the two exceptions to the rule, that this writ shall not issue for a mere legal demand, for which the defendant might have been holden to bail, viz. 1st, at the instance of a wife suing in the spiritual court for alimony: as to which, vide *Shaftoe v. Shaftoe*, 7 Ves. 171; Dawson v. Dawson, *ib.* 173; Oldham v. Oldham, *ib.* 416; Haffey v. Haffey, 14 Ves. 261. Mr. Beames's Brief View, 30, &c. et seq.; and, 2dly, in matters where the courts of law and equity have a concurrent jurisdiction; as to which, vide *Russell v. Ashby*, 5 Ves. 96; Jones v. Sampson, 8 Ves. 593; Hannay v. McEntire, 11 Ves. 55; Jones v. Alephsin, 16 Ves. 471; also Mr. Beames's Treatise, cit. *sup.* — *Eden*.]

The exceptions to the rule, that this writ lies only upon equitable debts, as laid down by Mr. Justice Story, are, 1st, alimony, as above; 2d, the case of account, on which a balance is admitted by the defendant, but a larger claim is insisted on by the creditor. 2 Story, Eq. Jur. ch. 41, § 1471, § 1472, § 1473. See *Denton v. Denton*, 1 John. Ch. 364, 441. See also the cases cited above, and 1 Hoff. Ch. Pr. ch. 2, § 8, p. 92, 93, in note.

(b) See 1 Story, Eq. Jur. ch. 4, § 81; Powers v. Ware, 2 Pick. 459; 1 Chitty, Pl. (7th Lond. ed.) 378, 379, (9th Am. ed.) 366.

(c) *Shields v. Commonwealth*, 4 Rand. 541; 1 Story, Eq. Jur. ch. 4, § 81, et seq. Courts of chancery take jurisdiction to give relief in cases of lost or destroyed bonds, notes, &c. on the ground of being able to furnish more adequate indemnity to the defendant than courts of law. *Irwin v. Planters' Bank*, 1 Humph. 145. See *Graham on Juris.* 528-532; 1 Story, Eq. Jur. ch. 4, § 82.

(d) As to the affidavits necessary to obtain this writ, vide *Shearman v. Shearman*, post, 370. — *Eden*.

{ See Hoff. Ch. Pr. ch. 2, § 8, p. 93 to 96; *Gibert v. Colt*, 1 Hop. 500; *Thane v. Halsey*, 7 John. Ch. 193; *Flack v. Holme*, 1 Jac. & Walk. 405; *Mattocks v. Tremain*, 3 John. Ch. 75; 1 Smith, Ch. Pr. (Am. ed.) ch. 18, p. 580, et seq.; 1 Barbour, Ch. Pr. B. 3, c. 6, § 2, p. 649, et seq. }

BRIDGE v. ABBOT. Rolls, 7th Feb.

(Reg. Lib. 1790. A. fol. 253.)

Bequest of residue to certain persons, and if these should die in the lifetime of the testatrix, to their legal representatives. One died: his next of kin shall take the share of the residue, not his executor beneficially, or his residuary legatees. (1)

MARY KING made her last will and testament, and some codicils thereto; and, by a second codicil to her will, dated 14th May, 1782, taking notice of the death of her cousin, Stephen Abbot, the elder, whom by her will she had appointed executor, and that by the death of said Stephen Abbot, the residue of her estate remained undisposed of, she gave and bequeathed all the residue and remainder of her personal estate and effects, unto the defendant Abbot, six other persons (not parties), and the testator John Webb, deceased, equally to be divided between them, share and share alike; and she directed, that in case of the death of any of them (the said residuary legatees) before her, then the share or shares of him, her, or them, so dying before her, should go to, be had and received by, his or her legal representatives, and appointed the said defendant Abbot, and John Webb, executors of her will.

John Webb died the 14th February, 1788, in the lifetime of the testatrix, possessed of a considerable personal estate, and having made his will, dated 10th January, 1786, whereby he gave several legacies to the plaintiffs and defendants, and appointed the defendants, Abbot and Stonard, executors, leaving the plaintiffs and some of the defendants his residuary legatees. *Soon after the death of John Webb, [*225] on the 24th March, 1788, the testatrix, Mary King, died; and upon settling the account of her property, 2235*l.* 19*s.* was paid, by the surviving executor of Mary King, to the executor of John Webb, as his share of the residue of her estate.

The plaintiffs claimed, and filed their bill for this property, as next of kin of John Webb, insisting, that it not being such a vested interest, at the time of making his will, or at his death, as he could dispose of by will (the testatrix being then alive), it must be considered as part of his personal estate undisposed of by his will, and concerning which he was to be considered as having died intestate, and that they were therefore entitled thereto.

The defendants, the executors of John Webb, claimed the residuary part of the testator's estate, in that capacity; and the residuary legatees claimed the same, as part of the personal estate of John Webb.

The case had been argued this term, and this day his Honor gave judgment to the following effect:—

Master of the Rolls. There is nothing more clear than that a testator may, if he thinks fit, prevent a legacy from lapsing. (2) It is necessary, according to *Sibley v. Cook* (3 Atk. 572), not only that he should declare that the legacy should not lapse, but likewise who should take in the stead of the residuary legatee.

(1) See also *Long v. Blackall*, 3 Ves. 486; and as to the general principles, *Maybank v. Brooks*, ante, 1 vol. 84, and the Editor's notes. It is very observable that the case of *Evans v. Charles*, 1 Anstr. 128, determined in the Exchequer, soon after the principal case, does seem very irreconcilable with its decision, notwithstanding what is said there by the Lord Chief Baron (p. 132), by Lord Loughborough C. in *Long v. Blackall*, 3 Ves. 490, and by the M. R. in *Holloway v. Holloway*, 5 Ves. 402. In addition to the references contained in the Editor's note, ante, 1 vol. 84, vide *Jennings v. Gallimore*, 3 Ves. 147.

(2) Vide *Maybank v. Brooks*, ante, 1 vol. 84, with the Editor's note.

I cannot suppose that the testatrix meant, by the substitution, that any person who claimed under the will of the residuary legatee should take; nor could she intend, that any persons who should casually represent John Webb, as executors, who might be different persons, one representing him here, another abroad, one in the province of Canterbury, another in the province of York, should take; she could not mean, that the person who might be entitled to the probate of the will should take this beneficially.

The executors being out of the case, the next thing is, whether she could intend that it should be given in such a manner, that John [*226] Webb should dispose of it. She might have done this *by giving it to such person as John Webb should appoint. If she had given it thus, all the persons who had claims under his will, and their representatives, if they died before Mary King, must take, which is absurd to suppose.

I am of opinion, that the true construction is, that, by legal representatives, she meant such persons as could claim John Webb's property in their own right; which would be his next of kin.

What does John Webb dispose of by his will? his own estate; he does not affect to dispose of what might come from the will of a living person.

It so happens, that there may be a special residue, as there was in the *Attorney-General v. Johnson*, Ambler 577, where the question was, whether by *residue* was meant all that should lapse; and it was held, that he did not intend the lapsed legacy to pass. The case of *Davers v. Dewes*, 3 P. Wms. 40, was there referred to.

It is absurd to suppose he meant everything to pass which might arise by fresh acquisition. Is it possible he could intend to pass what might come under this will? Although it is argued that persons by these residuary devises often convey estates of which they were not consanguine; yet suppose he had children, and after giving something to each, had given the residue to one; *non constat*, he meant the same, in case of a great acquisition. Then it is not probable he meant these persons to take by the description of legal representatives.

It is true, that by legal representatives, in the Court of Chancery, we generally mean the persons in whom the estate legally vests. But these may be several persons, according to the situation of the property; one person in the province of York, another in the province of Canterbury.

There is another sense in which the words, *legal representatives* may be understood, viz., the persons entitled beneficially to the property. It is true, in the statute of distributions, the words *legal representatives* are not used for next of kin, nor for executors or administrators, but [*227] for the testator's *children, or their children only, or the descendants of the next of kin: the statute means persons substituted in the place of others, deceased.

I think I impute a more probable sense to the words, than either the executor or residuary legatee of John Webb.

Then, another question may be made, whether they are to be the representatives at the death of John Webb or Mary King; and if they be different persons, there must be an inquiry as to that: I think they cannot be the legal representatives at his death, for then the shares would be lapsed before they vested, but at the death of Mary King, for she meant it to go to persons alive at her decease. She meant such persons as, at the time of her decease, would be entitled to John Webb's property, if he had survived her, or died intestate.

This seems the most rational construction, and liable to the fewest absurdities: for the share of the residue was not intended to be assets of John Webb.

The case of *Sibley v. Cook* will, I think, hardly prove much; it was given to executors — I think if that had been the word used in this case, there might have been considerable doubt. The person taking could not claim under John Webb, his executor might have been an executor in trust: I think, therefore, she meant his next of kin at her death.

It might have been, that some of them had died between his death and hers: as none died, there will need no inquiry.

I must therefore declare the persons entitled as legal representatives, to be the persons who would have been entitled as next of kin to John Webb, at the death of Mary King. (3) (a)

(3) The Master of the Rolls, some years afterwards, speaking of this part of the report, in *Holloway v. Same*, 5 Ves. 402, says, "I wish to add a few words to the report of that case, to show what the decree was. The report states, that I declared the persons entitled, as legal representatives, to be the persons who would have been entitled as next of kin, to John Webb, at the death of Mary King. I desire, that these words may be added: 'in case he had at that time died intestate.' I believe these words were added in the decree."

Upon consulting the Reg. Book, accordingly, the declaration appears thus: "that by the words 'legal representatives,' mentioned in the codicil to the will of the said testatrix, the next of kin of John Webb deceased, therein also named, will be entitled to the share of the residue of her personal estate, to which the said John Webb would have been entitled, in case he had survived the said testatrix." — R. L.

(a) See 2 Williams, Ex. Pt. 3, Bk. 3, ch. 2, § 5, p. 758–762; cases cited in note (b) to *Maybank v. Brooks*, 1 Bro. C. C. 85; *Ballard v. Ballard*, 18 Pick. 41.

[The extension of a devise or legacy to heirs or executors will not prevent the devise or legacy lapsing, per Sir W. Grant, *Smith v. Pybus*, 9 Ves. 576. The former point has been decided from the time of *Brett v. Rigden*, Plowd. 340, confirmed in *Goodright v. Wright*, 1 P. W. 397, where see the subsequent cases. The doctrine as to legacies was entered into at large in *Elliot v. Davenport*, 1 P. W. 83, where it was agreed that where a legatee dies in the life of the testator, though the executors are named, yet the legacy is lost, but that a will might be so penned, as that the executor of the legatee should have the legacy; but then it ought to appear in the will plainly, and by direct words, that this was the testator's intention. *Sibley v. Cook*, 3 Atk. 572; *Sibthorp v. Moxom*, ib. 580; *Maybank v. Brooks*, ante, vol. I. 84; *Hutcheson v. Hammond*, ante, 128; *Corbyn v. French*, 4 Ves. 418; *Toplis v. Baker*, 2 Cox, 121. In the case of *Evans v. Charles*, 1 Anst. 128, where there was a bequest to certain persons or their personal representatives, the Court of Exchequer held an administratrix of one of those persons to be entitled against the claims of the next of kin, and the residuary legatee. The Court endeavored to differ that case from the present, but the distinction between the two cases cannot be considered as completely satisfactory. In *Long v. Blackhall*, 3 Ves. 486, a limitation in case of lapse to the legal representatives of the testator, was established in favor of the next of kin. Lord Rosslyn was there of opinion, that both the determinations in the present case, and *Evans v. Charles*, were perfectly right, showing that the words are to be explained according to the subject-matter.

Where a legacy is given to a person, who dies in the lifetime of the testator, but the legacy is given over, the death of the person to whom the legacy is immediately given, will not interrupt the intended bounty of the testator. *Miller v. Warren*, 2 Vern. 207; *Darrel v. Molesworth*, ib. 378; *Perkins v. Micklethwaite*, 1 P. W. 274; and the cases there cited; *Northey v. Strange*, ib. 343; *Willing v. Baine*, 3 P. W. 113. Vide also *Rheeder v. Ower*, post, 240. — *Eden*.]

*COLLET v. WOLLASTON. Rolls, same day. [*228]

(No Entry.)

An insolvent debtor is not a necessary party to a bill by a purchaser of his interest in stock, against his assignee. But if it has been sold for an apparently under-price, the Court will inquire into the real value, previous to decreeing a specific performance.

THE plaintiff was purchaser, at an auction, of the reversionary interest of two sums of 2000*l.* South-sea stock, and 1200*l.* new South-sea an-

nuities, subject to the life-interest of Thomas Mulcaster, an insolvent debtor of the age of 45 years, which were standing in the names of trustees in his marriage settlement, and subject to the uses thereof, at the price of 320*l.* for the said 2000*l.* South-sea stock, and 215*l.* for the said 1200*l.* new South-sea annuities; and now filed his bill, against the assignee of the said insolvent debtor, and the trustees in the marriage settlement, for an assignment and transfer of the same into the names of new trustees, for the benefit of such of the defendants as were entitled to the dividends during the life of the insolvent debtor, and for the benefit of the plaintiff, after his decease.

One of the questions was, whether Thomas Mulcaster, the insolvent debtor, ought to have been made a party to the bill, which he was not. And his Honor, this day, declared his opinion that he was not a necessary party; (a) but, the reversionary interests seeming to have been sold for a very low price, said he would direct an inquiry into their value, before he decreed a specific performance of the purchase. (b)

(a) As to parties, see references in note to *Sherrit v. Birch*, post, 229.

(b) 1 Madd. Ch. Pr. (4th Am. edit.) 425; *Seymour v. Delancy*, 6 John. Ch. 222; *Clitherrall v. Ogilvie*, 1 Desaus. 257; *Osgood v. Franklin*, 2 John. Ch. 23; *Gwynne v. Heaton*, 1 Bro. C. C. 6, note (a), 10, note (c).

STOKES v. M'KERRAL. Rolls, 8th Feb.

(No Entry on this occasion.)

Issue ordered to discover a witness's interest. (1)

In this case, a witness had been examined. It became afterwards suspicious, that he was interested, either personally or as a trustee. His Honor ordered an issue, in order that, upon his examination in the court of law, questions might be put to him, to discover his interest; though he said he thought the Court might order an interrogatory to be exhibited to him, in the nature of a *voir dire*. (1) (a)

(1) The examination of witnesses in equity is attended with so much inconvenience, that it has been held, the cross-examination of an opponent's witness does not waive objections to his competency in point of interest; and the reason given is, that it cannot be known before publication whether the witness has or not admitted the fact. See *Moorhouse v. De Passou*, 19 Ves. 433, 434, and *Coop. Ca. Ch. 300*. It is to be observed, however, upon this, that the practice formerly was contra, *Corpor. of Sutton Coldfield v. Wilson*, 1 Vern. 254 (there cited), though *Scott v. Fenwick*, Gwill, 1250 (there also cited), warrants it, as well as Lord Eldon C.'s observation, that "there may be a general interrogatory to every witness, as to whether he is interested." See in *Purcell v. M'Namara*, 8 Ves. 326. The objection, as to an interest in any witness, is much attended to by the Court; and a party was, under the circumstances, allowed a commission to examine witnesses as to the point of interest in others, who had been examined before publication had passed. See *Vaughan v. Worrall*, 2 Madd. R. 322, et seq., in which Sir Thomas Plumer, Vice-Ch., went through all the material cases with great care. < See *Cullaghan v. Rochfort*, 3 Atk. 643; *Wood v. Hammerton*, 9 Ves. 146; *Carlos v. Brook*, 10 Ves. 49; *Mill v. Mill*, 12 Ves. 406. >

(a) 2 Madd. Ch. Pr. (4th Am. edit.) 422, 423; 2 Smith, Ch. Pr. (Am. edit.) ch. 9, p. 76.

*SHERRIT v. BIRCH. Rolls, same day. [*229]

Parties. [In a suit for a moiety of a residue, the other persons interested must be before the Court.](1)

BILL as to the moiety of a residue; the other moiety was given to A. (one of the defendants) for life, and, upon her decease, to such persons as she should appoint; and, in default of appointment, to certain other persons.

Upon the opening, Mr. Richards objected that these persons were not brought before the Court.

And, although the interest was upon such a remote contingency, his Honor thought they must be made parties; and the cause stood for that purpose, the plaintiffs paying the costs of the day to the defendants.

(1) Vide *Parsons v. Neville*, postea, 365; and *Elmalie v. M'Aulay*, postea, 624; *Cockburn v. Thompson*, 16 Ves. 328; < *Story*, Eq. Pl. ch. 4, § 89, and the examination of the cases in the notes to this section, ib. § 147, § 165, § 203, 204; *Davoue v. Fanning*, 4 John. Ch. 199; *Brown v. Ricketts*, 3 John. Ch. 555; *West v. Randall*, 2 Mason, 181, 190-199. If any of the residuary legatees, or distributees, are out of the jurisdiction of the Court, the Court may dispense with them. *Story*, Eq. Pl. ch. 4, § 89. See *West v. Randall*, 2 Mason, 181, 190-199; *Brown v. Ricketts*, 3 John. Ch. 555, 556, as to parties in such cases. As to whether it is sufficient for one residuary legatee to sue on behalf of himself and all the other residuary legatees, see *Brown v. Ricketts*; *Davoue v. Fanning*, ubi supra; *Kettle v. Crary*, 1 Paige, 417, 419, 420, note; *Ross v. Crary*, 1 Paige, 412; *Hallet v. Hallet*, 2 Paige, 19, 20; *Story*, Eq. Pl. ch. 4, note to § 89. See also, on the subject of parties, *Cullen v. Queensberry*, 1 Bro. C. C. 103, and cases cited; *Moffatt v. Farquaharson*, 2 Bro. C. C. 338. > But, even in the case of a residue, there may be exceptions. Vide 16 Ves. 328, referring to *Chancey v. May*, Finch, Prec. Ch. 592.

CHAPMAN v. GIBSON. Rolls, 10th Feb.

(Reg. Lib. 1790. A. fol. 513.)

[A testator having copyhold estate unsurrendered and no freehold.](1) Surrender supplied for a wife against a distant heir (2) not provided for by the testator, though provided for *aliunde*. (3)

THE testator devised "all his estate whatsoever, and wheresoever, and of what nature or kind soever," to his wife.

He had only copyhold estate. His heirs-at-law were a nephew and niece, who took no provision under the will, but were otherwise provided for. The estate was not surrendered.

The bill was by the wife, against the heir-at-law, praying a surrender of the estate.

Several cases were cited: but as the arguments made use of by the counsel were repeated by his Honor, in his judgment, it is not necessary to state them here.

His Honor gave judgment this day.

Master of the Rolls. Though I have not found any case where a

(1) Reg. Lib. et postea, 232, note, et vide *Church v. Mundy*, 15 Ves. 296, &c.

(2) See now, however, *Fielding v. Winwood*, 16 Ves. 90. As to the difference of opinion between Lord Loughborough C., in *Hills v. Downton*, 5 Ves. 557, and Sir P. Arden, M. R. (who decided the principal case) with regard to the Court's entering or not into the consideration, whether an heir is provided for, where there is a natural obligation to provide for him, see App. to Sugden on Powers, and Scriven on Copyholds, 136, 137, 138, and *Rodgers v. Marshall*, 17 Ves. 294, and 16 Ves. 92.

(3) Lord Redesdale's notes observe this to be immaterial, referring to p. 231.

distant heir-at-law has been compelled to make a surrender for the wife (2), yet I shall not forbear to make the precedent, if I can [*230] find a principle. I have looked at all the cases I *can, to find on what principle this Court goes, in supplying a defect, and altering the legal right. It is this—whenever a man, having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir, to make him perfect this intention. This is an intelligible principle. Very early, where the testator showed an intention to provide for debts, this Court would supply the defect against the heir. This is not to be confounded with the case of the heir's being disinherited [of estates at the common law] by wills not duly executed: there is no will at all; the Court cannot see that there is such an instrument: (4) but wherever there is such a power, it has been executed. The next class of cases are those where there is a natural obligation. Formerly, some judges have thought otherwise; but it is now settled, that the Court will not inquire into the *quantum* of the provision. It is sufficient, that the testator is acting in discharge of moral or natural obligations; and it is very difficult for the Court to enter into such an inquiry: the father must be the best judge. The question has been, whether this is to be done, so as to put a younger child in a better condition than an elder. Now I take it to be settled that this is no objection. The father is the judge as to the *quantum* of the provision. But still there remains a case, which I admit has been determined, whether wisely or not I do not say, viz., that the heir [being a son] is not to be compelled to supply the surrender, if he is totally unprovided for; (5) at first, the word “disinherited,” was used in this subject; but I take this not to be so; and this Lord Hardwicke says, for it is of no consequence whether the provision comes from the father or not. Now, on what principle can the Court have made this exception? It is attended with difficulties, to know when the son shall be said to be unprovided for. The principle must be this, that the testator being under an obligation to do an act, we will compel the heir to perfect it, but we will not compel him to fulfil an obligation at the expense of another; and, if the testator has totally forgot to make any provision for his eldest son, this shall be an answer to the claim of the wife, or other children. If this be the principle, it remains to be decided whether it can be applied to any person but a child. This idea struck Sir Thomas Sewel, in *Brooke v. Gurney*, though that case is not a decision of it.

Upon the several cases, the principle may be collected (and [*231] satisfactorily, *I think, except as to the exception of an eldest son provided for), *Hardham v. Roberts*, in 1682, 2 Vern. 132; *Bradley v. Bradley*, 2 Vern. 163. In *Bath v. Montague*, 3 Ch. Ca. 106, Lord Holt says, that was a power, under hand and seal, to charge the estate with provision for younger children; he made a reversion for the benefit of younger children, not exactly pursuant to the power. “This was held good in equity.” I think the execution of a power, and a surrender of a copyhold, go hand in hand, precisely on the same ground. He recognizes the principle, that it depended on being the case of a natural obligation: on account of which the Court would interpose. *Kettle v. Townshend*, 1 Salk. 187, where it is said, “not to be material, whether the son is before provided for; for the father is the best judge whether the son is sufficiently

(9) See note (2), preceding page.

(4) See *Shedden v. Goodrich*, 8 Ves. 481, 492, 493, &c.

(5) See the references in note (2), *antea*.

provided for, or not." And in *Freestone v. Raul*, mentioned in the note to *Watts v. Bullas*, 1 Wms. 61 (for which, I looked into the Register's book), the same thing was done. Now, as to a grandchild, I cannot see why he should not have the same equity: for the statute of Elizabeth has made it compulsory on a grandfather to provide for him. However, it will be for the Court to determine this matter when the case comes before it. *Watts v. Bullas*, 1 Wms. 60, shows that a brother of half blood is not within the case; but that is not material to this point. In *Tollett v. Tollett*, 2 P. Wms. 489, a defective execution of a power was supplied for a wife. In † *Ross v. Ross*, 1 Eq. Abr. 124, the surrender was not supplied because the devise was satisfied by the freehold; that was the ground of the determination; the reason therefore afterwards given, as to disinheriting the brother, was not material. *Cook v. Arnham*, Cases temp. Talbot, 35, the only doubt there was, whether the rule would extend to reversionary interests. *Andrews v. Wall*, 6 Vin. 237, the surrender was supplied. *Hawkins v. Leigh*, 1 Atk. 387, that case does not determine the point, for Lord Hardwicke thought the will did not pass copyhold; but there is Lord Hardwicke's opinion, that the word "*disinherison*" is not the proper word; but the question is, whether the heir is unprovided for. I have looked into the Register's book, for *Taylor v. Taylor*, reported 1 Atk. 386, and find it rather more in point than as it stands in the book. There, two thirds of the copyhold were given to the wife, though the book does not state it. The fact *was, the father purchased in [*232] the son's name; the father continued in possession. On the father's death the son took possession, made a will, and died. The copyhold descended on his heir-at-law. It does not appear that any real estate descended on the second son. The bill was brought against the defendant, as heir-at-law of his brother, the second son; the eldest son insisted, that if the second son took the copyhold as an advancement, it should be brought into hotchpot. Lord Hardwicke directed the surrender to be supplied: so that here is a case of supplying a surrender against the heir, who took nothing from the second brother. *Smith v. Baker*, 1 Atk. 325, compares the rule to an heir in blood, and no other distinction there made; but, surely, the right question must be, whether there is any obligation to provide: for otherwise, why should it not be applied for the *hæres factus*? *Hervey v. Hervey*, 1 Atk. 561, shows, that one branch of a family shall not be provided for by the ruin of another. *Macy v. Sharmur*, 1 Atk. 389, surrender supplied. *Roome v. Roome*, 3 Atk. 181; *Goodwyn v. Goodwyn*, 1 Vesey, 226; *Tudor v. Anson*, 2 Vesey, 582.—These are all the cases reported on the subject. There has been another case mentioned of *Brooke v. Gurney*; but neither of the points in that case affect this. The same question arose there, but was not necessary to be determined. Sir Thomas Sewel had considered the point, and thought it of great weight. The case turned on the words of the will, which were, "all my lands whatsoever, and wheresoever, and of what nature, kind, or quality soever, (6) to my wife." The wife acquiesced, from 1763, to 1779. She sold freehold estate in 1763. Sir Thomas Sewel determined on the acquiescence, and thought the words of the will sufficient. On appeal to Lord Thurlow, he thought the acquiescence did not bar, but that the words were not sufficient. Now, in this case, is the argument that the heir is unprovided for, an answer to the equity? He cannot be said to be unpro-

† The proper name of this case is *Boss v. Boss*, and it is so cited, 6 Vin. 238.

(6) Lord Redesdale's notes, question "whether these words were in the will."

vided for, when the father is alive. However, I think this is not material, for, according to the cases, a wife has a right, where there is not an equal moral obligation violated by giving her relief. On the whole, upon principles and cases, I think the wife is entitled to have the surrender supplied. (a)

Decree an injunction to restrain proceedings, a surrender when of age, and a day to show cause. (7) (b)

(7) The decree recited, that "it appearing the testator had no other real estate, save and except the copyhold estate in question," &c. — R. L. This evinced that the Court kept in view the distinction taken by Lord Hardwicke, in *Chapman v. Hart*, 1 Ves. 273, and which has been lately exemplified in *Church v. Mundy*. See it on the Appeal, 15 Ves. 396, et seq. et *ibid.* 407.

(a) See Sugden on Powers (4th Eng. edit.), ch. 6, § 1, p. 350, et seq. for a full discussion of this subject. See also *ib.* 727, 728, Appendix.

[The doctrine laid down by Lord Alvanley, in the present case, as to supplying a surrender for the wife, when the heir was unprovided for, called forth the dissent of Lord Rosslyn, in *Hills v. Downton*, 6 Ves. 557. It was agreed by both of them, that upon the later decisions it was immaterial how ample or how scanty the provision for the wife might be; and it was also in effect admitted by Lord Alvanley, in the present case, that a collateral heir, whether provided or unprovided for, has no right to resist the wife's equity. The difference therefore of opinion between those learned judges (as observed by Sir William Grant, in *Fielding v. Winwood*, 16 Ves. 92) is reduced merely to this, whether a surrender is to be supplied for the wife against an heir unprovided for, when that heir is the son of the deviser. Lord Alvanley, in some valuable observations written by himself, upon the case of *Hills v. Downton*, which are published by Mr. Sugden, in the Appendix to his Treatise on Powers, 672, appears, notwithstanding that case, to have retained his former opinion, observing, that if the case of a son wholly unprovided for were to come before him, he should hesitate, notwithstanding the great authority of the Lord Chancellor, to make a decree against him. The line of argument adopted by Lord Alvanley, is so convincing and satisfactory, that it is probable that whenever the Court has to decide between the two conflicting opinions, his will be adopted. The ground upon which the Court proceeds, is, that where the will expresses an intention to do that which legally and morally the testator ought to do, so simple a form as supplying the want of a surrender shall not impede the performance of that duty. Hence the heir will be compelled to make good the disposition, if made in discharge of the moral or natural obligation of his ancestor to creditors, wife, and children. But still, as Lord Alvanley observed, that had not been done (and as it is submitted, consistent with reason and principle cannot be done), where the heir, being a son, could show, that if he was compelled to make that surrender, the consequence would be (he being a son wholly unprovided for), that he would be compelled to fulfil the intentions of his father in discharge of a moral or natural obligation in favor of a widow, or of his brothers and sisters, where it was manifest that he had neglected to discharge the natural obligation he was under, of providing for him, his eldest son. It appears, by the inquiry directed in the case of *Rogers v. Marshall*, 17 Ves. 297, that Sir William Grant inclined to Lord Alvanley's opinion. See, upon this subject, Sugden on Powers, 347, et seq.; *Lindopp v. Eborall*, ante, 188. — *Eden.*]

(b) Costs to the defendants, (Reg. Lib.) — *Eden.*

[*233]

*LEACROFT v. MAYNARD.

[Vide S. C. 1 Ves. jun. 279.] Lincoln's-Inn-Hall, March 4.

(Reg. Lib. 1790. B. fol. 402.)

Testator gives by will a legacy to a charity, void by stat. of Mortmain; by codicil he gives a less legacy "instead thereof," to a different charity, this shall be held to be charged on the same fund, and therefore void also. (1)

THE testator gave several legacies by his will, which he directed to be raised out of his real estate; and, among others, a legacy of 1000*l.* to the hospital in the county of Leicester, and specifically bequeathed his personal estate. The legacy was, of course, void, by the statute of Mortmain. But the testator, by a codicil, revoked this legacy of 1000*l.* to the

(1) See *Attorney-General v. Goulding*, ante, 2 vol. 428; *Crowder v. Clowes*, 2 Ves. jun. 449, 450, and *Cooper v. Day*, 3 Meriv. 154, 156. { See also 2 *Williams*, Ex. Pt. 3, Bk. 5, ch. 3, p. 1008; *Ram on Assets*, ch. 6, § 9, p. 114, 115. }

hospital in the county of Leicester, and, "instead thereof," he gave the sum of 500*l.* to the hospital of the county of Nottingham, without mentioning any particular fund out of which the same was to be paid. By the same codicil he revoked several other legacies, and, "instead thereof," gave smaller legacies to the same legatees, without mentioning any fund out of which the same were to be paid.

On behalf of the hospital of the county of Nottingham, Mr. *Attorney-General* contended, that the legacy being given generally by the codicil, must be payable out of the personal estate; and that it might be reasonably supposed that, after making his will, the testator was apprised of the invalidity of the charitable bequests charged on his real estate, and therefore revoked them, and bequeathed other legacies, generally out of his personal estate.

But Lord CHANCELLOR said, he thought that the codicil only meant to alter the *quantum* of the legacies in some cases, and the objects of them in others, but not the fund out of which they were to be paid; and that, therefore, the legacy to the hospital in the county of Nottingham was void. (2) (a) (b)

(2) The costs were apportioned between the real and personal estates. — R. L. and the Report, 1 Ves. jun. 232.

(a) A legacy substituted for, or added to another, shall be raised out of the same fund, and subject to the same conditions; Crowder v. Clowes, 2 Ves. jun. 449. So, where a legacy given by will was directed to be exempted from the legacy duty, a legacy substituted by a codicil was also considered as exempted; Cooper v. Day, 3 Meriv. 156. — *Eden*.

(b) Costs given out of the respective estates. — *Eden*.

MARGERUM v. SANDIFORD. Rolls, 17th Feb. 17th March.

(Reg. Lib. 1790. B. fol. 233.)

Where any part of a solicitor's bill relates to business done in this Court, the whole may be taxed, although part of the business was for other persons jointly with the person applying. (1)

THIS was a petition to have a solicitor's bill taxed. The bill was partly for business done in this Court, and partly for levying fines and for conveyancing; but, in the latter, the petitioner was interested jointly with three or four other persons, and the *petitioner was charged [*234] with his share only of that. The objection was, that the conveyancing business was not an object of taxation, under the act of Parliament.

For the petition, a note in *Douglas*, 199, was relied upon, to show, that, if business had been done, for which the bill might be taxed, the charges for conveyancing business might be taxed also; though it was not so where the bill was for conveyancing only.

His Honor was of that opinion; but said, that here the conveyancing business was for four or five persons, and could not be mixed with a bill for business done in Court for the petitioner only.

To this it was answered, that, as the petitioner was charged with his proportion only, which he submitted to pay, it made no difference, for the other parties would not be bound by this reference.

(1) And see the late important case of Hazard v. Lane, 3 Meriv. 285, and Bignol v. Bignol 11 Ves. 328. { 1 Smith, Ch. Pr. (Am. edit.) 697; 2 Madd. Ch. Pr. (4th Am. edit.) 565. }

It stood over, that his Honor might speak to the Judges of the Court of King's Bench. (2)

And his Honor, on a subsequent day, said, that, having consulted them, he found that their rule was to order the whole of a solicitor's bill to be taxed, when any part of it concerned business done in that Court; and it made no difference where part of it was done for several other persons, as well as the party who applied. His Honor, therefore, made an order for the taxation of the whole bill. (a)

(2) Vide 2 Hallock on Costs in Actions, &c. at Law, 502, et seq.

(a) This subject was much discussed in the case of *Hill v. Humphreys*, 2 B. & P. 343. Vide also *Ex parte Williams*, 4 T. R. 124; *Winter v. Payne*, 6 T. R. 645; *Mowbray v. Fleming*, 11 East, 285; *Benton v. Garcia*, 3 Esp. N. P. C. 149; *Crowder v. Shee*, 1 Campb. N. P. C. 437; 2 Hallock on Costs, 502, et seq. Vide also *Hazard v. Lane*, 3 Meriv. 290. — *Eden*.

RAYNER v. MOWBRAY. Lincoln's-Inn-Hall, 21st March.

(Reg. Lib. 1790. B. fol. 205.)

Gift of a residue, to be divided among persons related to the testator, confined to relations within the stat. of distributions. (1)

JOSEPH MOWBRAY made his will, dated 11th December, 1780, and thereby devised his real estate to Isaac Rayner, in trust, to permit his, the testator's wife, to receive the rents, &c. for her life; and, after her decease, to sell the same, and then as follows: "to divide and pay the moneys arising by virtue of the sale of his said estate, to and among [*235] all and every *such person and persons who shall appear to be related to me only, share and share alike; and that such person or persons shall prove himself, herself, or themselves entitled to the same, in six months after my said estates shall be so sold as aforesaid; save and except my nephew, John Wood, of Morpeth, near Newcastle, to whom I give one shilling only."

The plaintiff was the executrix of the trustee, the defendants were surviving sisters of the testator, and children of a deceased brother, and also of surviving sisters.

The question was, whether any persons could take shares of the property, but those who would be entitled under the statute of distribution.

Mr. *Solicitor-General*, for the children of the surviving sisters, contended, that, although the general rule was, that the word *relations* only signified such persons as were next of kin, within the statute of distribution, yet, that in this case the words were clearly meant to be more expressive. That by excluding the nephew, whose mother was alive, and who, consequently, was not one of the next of kin, the testator clearly meant to include persons in the same degree. That, in fact, this was precisely the same case as that under General Honeywood's will (*Bennet v. Honeywood*, Ambler, 708). The division must therefore extend to the children

(1) See *Whithorne v. Harris*, 2 Ves. 527; *Goodings v. Goodings*, 1 Ves. 231, and Supplement to Vesey, 122, 123; 1 Roper on Legacies, 115, 118, &c., the notes to *Phillips v. Garth*, ante, 64, et seq. < and p. 69, note (a); > *Pope v. Whitcombe*, 3 Meriv. 689; *Smith v. Campbell*, 19 Ves. 400, and *Cooper*, Ch. Ca. 275; < *Green v. Howard*, 1 Bro. C. C. 33, and cases cited in note (a); 2 Williams, Ex. Pt. 3, Bk. 3, ch. 2, § 2, p. 729, 730; *Masters v. Hooper*, 4 Bro. C. C. 207; *Stamp v. Cooke*, 1 Cox, 234. >

of the sister, and be in equal proportions. *Thomas v. Hole*, Forrest. 241 ; *Jones v. Beal*, 2 Vern. 381 ; *Blackler v. Webb*, 2 Wms. 383 ; *Phillips v. Garth*, ante, 64. -

Mr. *Mansfield* insisted, that the division must be *per stirpes* ; and that that had always been the construction of the statute with respect to the representatives of dead persons.

Lord CHANCELLOR said, the difficulty was, how to construe the word *relations*, but by a reference to the statute of distributions. If it was a recent matter, there might be a doubt ; but he took the statute to be declaratory of the old law. When once a rule has been laid down, it is best to abide by it. We cannot always be speculating what would have been the best decision in the first instance.

[*236] *Though the distribution is deferred to the death of the wife, that does not prevent the interests from vesting at the death of the testator.

RAMSDEN v. HASSARD. Lincoln's-Inn-Hall, 22d March.

(Reg. Lib. 1790. B. fol. 315.)

Estate for life in [real estates (1) and in] personalty, by implication.

GENERAL CARPENTER, by his will, (1) gave personal property to his wife for life, then to his two daughters, to be distributed to the children of their bodies by their last wills and testaments.

The question was, what should become of the intermediate interest, and Lord CHANCELLOR thought it must go to the daughters for life.

(1) Mr. Brown's statement of the present case is one exemplary instance, out of many, of peculiar inaccuracy, and of the indispensable necessity of carefully examining the cases with the Reg. Book. If the profession shall perceive that the Editor has labored to do this, and has often succeeded, he trusts it will excuse occasional oversights ; though he is not at present aware of any.

The question in the principal case did not relate merely to personalty, as reported by Mr. Brown, but embraced real estate also. The testator gave all his real estate, leasehold estates, &c., and all other his personal estate, "in a word, all his property," in trust for his wife for life ; and after her death (with a certain exception), he directed that the remainder which he died possessed of might be equally divided between his two daughters, to be by each of them divided among the children of their respective bodies, as each of them should appoint, by writing under hand and seal, purporting to be their respective last wills ; but if either of them should die in the lifetime of his wife, leaving no child or children behind her, then her share should become the property of his said daughter, to be disposed of as before mentioned.

His Lordship declared the daughters were entitled in equal moieties to the rents and profits, dividends, interest, and produce of the said testator's real and personal estate, not specifically bequeathed for their respective lives, &c. — R. L.

Upon the point of similar interests in personalty by implication, see *Ex parte Rogers*, 2 Madd. Rep. 449, and *Hammond v. Neame*, 1 Swanst. 35, and 1 Wils. Ch. 9, { and notes to *Browne v. De Laet*, 4 Bro. C. C. 634. }

DAWSON v. PARROT. Lincoln's-Inn-Hall, 22d March.

(Reg. Lib. 1790. A. fol. 294.)

Trustee ordered to pay costs, on misconduct.

UPON further directions, it appeared, from the Master's report, that the defendant Steel, had received, as executor of the testator, the sum of 2079*l.* 0*s.* 7½*d.*, and that he had paid 1538*l.* 17*s.* 6½*d.*, which reduced the balance in his hands to 540*l.* 3*s.* 1*d.*

The defendant Steel is an attorney, who made the testator's will, and appointed himself a trustee, and the will directs the trustees to place out the testator's money to the best advantage, for the plaintiff's maintenance and education: by his answer he claimed 156*l.* 9*s.* 9*d.* for a bill of costs due to him for business done previous to the death of testator; this bill the Master had taxed at 75*l.* 10*s.* 7*d.*; he had also charged 195*l.* 10*s.* 11*d.* for business done after the testator's decease; this bill had been taxed, at 52*l.* 17*s.* 10*d.* He appeared to have retained this balance in his hands from the year 1783.

LORD CHANCELLOR ordered him to pay the costs of taxing the bills, interest for the balance in his hands, and refused to give him the costs of the suit. (a)

(a) The cases on this subject are collected and referred to in notes to *Newton v. Bennet*, 1 Bro. C. C. 362.

[*237] *BOURDILLON v. ADAIR [ALLAIRE]. Lincoln's-Inn-Hall.

(Reg. Lib. 1790. A. fol. 210.)

Wife's legacy not to be paid to the husband without her consent taken before commissioners, she being abroad. (1)

THIS was a petition for the payment of a legacy of 167*l.*, given to the wife, to the agent of the husband, without the consent of the wife being taken in the usual way.

The ground of the petition was, that the parties lived at Tortola, and that a commission to take her consent would be so expensive, as to run away with great part of the legacy.

It was admitted, that it was usual, in sums under 100*l.*, (2) to do it without consent so taken.

But the LORD CHANCELLOR refused to do it without a commission. (3)

(1) As to such an examination abroad, in a foreign language, see the Editor's note to *Minet v. Hyde*, ante, 2 vol. 663.

(2) The practice of the Court was afterwards somewhat altered; and it now permits sums under 200*l.* to be paid over without consent. Vide note, 8 Ves. 201, and in *Austin v. Bank of England*, 524.

(3) A commission was directed accordingly. — R. L. Vide etiam *Parsons v. Dunne*, 2 Ves. 60.

Ex parte CROSSLEY. Lincoln's-Inn-Hall.

A bill being pledged in part, the whole may be proved by the pledgee. (1)

A BILL was drawn 17th March, 1788, by Hall, for Livesey and Co., Manchester, upon Livesey and Co., in London, for 200*l.* payable to Hartley. The bill was indorsed, by Hartley, to the petitioner, for a debt of 147*l.* 10*s.*, which was then owing from Hartley to the petitioner, which debt was afterwards reduced by the payment of 101*l.* 10*s.* to 46*l.*

The petitioner claimed to prove the whole sum of 200*l.* and to receive dividends till he should have received 46*l.*, but the commissioners only allowed him to prove 46*l.* A dividend had been made of 2*s.* 9*d.* in the pound.

He now petitioned for leave to prove the whole, and receive dividends, till he should have received 46*l.*, and in support of the petition, was cited the case *Ex parte* King, 1 Cooke's Bankt. Law, 203.

And the petition was allowed.

(1) Though Mr. Christian, in his Treat. on the B. L. 1 vol. 420, & 2 vol. 400, questions the principle of this decision; which was adopted by Lord Eldon C., in *Ex parte* Bloxham, 6 Ves. 449, and confirmed, *ibid.* 600, in opposition to Lord Loughborough's order, 5 Ves. 448, thereby discharged, Lord Eldon's determination seems irrefragable. { See also *Ex parte* Downward, Co. B. L. 167, 168; *Ex parte* Rushworth, 10 Ves. 412. }

**Ex parte* ARMSTRONG, a Lunatic.

[*238]

(Reg. Lib. 1790. A. fol. 228.)

Where there is a reference to the Master, in a case of lunacy, he shall make his report, although the lunatic be dead.

A REFERENCE had been made to the Master, to inquire, among other things, who were the next of kin of the lunatic. Before the Master made his report, the lunatic died. There being disputes among several persons, with respect to the lunatic's will, and who were his next of kin, it was wished by some of them, that the Master should still make his report; and on the hearing of this petition, it was prayed, that the Master should be directed so to do.

LORD CHANCELLOR. The order does not abate by the death of the lunatic; any party may still prosecute it and take out the Master's report. I say nothing as to the costs of the report; that may be a future consideration. (1) (a)

(1) The Lord Chancellor directed, in this matter, that certain paper writings alleged to be wills and instructions for a will of the deceased lunatic, which had been deposited, by order, in a strong box in the Bank, by the Accountant-General, should be opened with the privy of the Accountant-General, and that some of the petitioners should have notice and liberty to attend by their solicitors on that occasion, and to examine the said wills and instructions; and that such papers, when so opened and examined, should be delivered to A. B. C. D. &c., the persons stated to be executors therein named; they undertaking to deliver copies of them to the said petitioners. — R. L.

(a) See 2 Madd. Ch. Pr. (4th Am. edit.) 752.

Ex parte CLARKE, in the Matter of LIVESEY, &c. Bankrupts.

Indorser bound by his indorsement, though the bill is made to a fictitious payee.

PETITION to be admitted a creditor, in respect of certain bills indorsed by the bankrupt to the petitioner. The bills were made to fictitious payees. But it was said that circumstance was of no consequence against the indorser.

LORD CHANCELLOR. It is clear, that, as against the indorser, it does not signify what the bill is. The indorsee may come against the indorser, though the bill is a mere nullity in other respects. It is the indorser's business to see what he can make of the bill, but he, by his indorsement, is certainly liable to the indorsee. (a)

(a) See Chitty on Bills (10th Am. edit.) 157, 158, 705, 706.

So it has since been determined, that in an action against an indorser, it is not necessary to prove any indorsement on the bill prior to that of the defendant. *Crichlow v. Parry*, 2 Campb. 192. It had long before been decided, that in an action against the indorser, the hand-writing of the drawer need not be proved. *Lambert v. Pack*, 1 Salk. 127; *Lambert v. Oakes*, S. C. 1 Lord Raym. 443.

The present was one of the numerous cases, which arose in the bankruptcies of *Livesey and Co.*, and *Gibson and Co.*, a succinct account of which will be found in the note to the case of *Bennett v. Farnell*, 2 Campb. 130, 180. — *Eden*.

CARTWRIGHT v. HATELY.

[S. C. 1 Ves. jun. 292.] Lincoln's-Inn-Hall, 4th May.

(Reg. Lib. 1790. A. fol. 473.)

A person made defendant, who in fact is only a witness, if he answers, must answer fully, though he might have pleaded. (1)

A BILL filed by the executors of the late Lord Dudley and Ward, against the defendants, Hately and son, for an account of moneys received and disbursed by them, as agents of Lord Dudley, with respect to coal mines.

[*239] *The son, by his answer, insisted, that he was not liable to account, not being the agent of Lord Dudley, but merely a clerk to his father. Exceptions were taken to the answer, which being referred to the Master, he reported the answer sufficient. Exceptions being taken to the Master's report,

LORD CHANCELLOR thought it must be taken advantage of by plea, (2) not answer.

Mr. Abbot, for the plaintiff, said, that from the time of Lord King to Lord Bathurst, there were cases in which the Court had held, that to insist by answer that the party was not liable to account, was bad, that it must be by plea, and that his Lordship had held it so in the case of *Williams v. Farrington* (ante, 39).

(1) See the notes to *Cookson v. Ellison*, ante, 2 vol. 252, referring to *Fenton v. Hughes*, 7 Ves. 283, 239, and *Baker v. Mellish*, 11 Ves. 75, 76, &c.; *Beames*, El. Pl. 131, 256, and the next case. In the principal case, the Lord Chancellor observed, that the discovery might be lost, if the party were obliged to wait for the hearing of the cause, whereas, if the defendant had put the matter shortly in issue by plea, the delay would be trifling. — From Sir J. Simeon's notes.

(2) See *Beames*, El. Pl. 131, 256, and the reference.

Mr. *Partington*, for the defendant, said, such a plea would be a *negative* plea, and, as such, bad. (3)

But Lord CHANCELLOR allowed the exception, saying, that where the plaintiff has brought his bill against the witness as well as the principal, and the witness submits to answer, he must answer fully.† (4) (a)

† See *Ellison v. Cookson*, *antea*, vol. ii. p. 252 [and the next case].

(3) That doctrine, however, has since been overruled. *Beames*, El. Pl. 120, 121, et seq.; 2 *Ves. & Beames*, 159.

(4) The matter was in fact compromised between the parties, upon the decided impression of the Court, as above. — B. L.

(a) See *Wigram on Discov.* (Am. edit.) Prop. 2, Pl. 276, et seq., p. 194, et seq., and cases cited and commented on, and also the cases cited in notes to *Cookson v. Ellison*, 2 Bro. C. C. 252, in reference to the subject in the text; 1 *Barbour's Ch. Pr.* B. 1, ch. 6, § 5, p. 131, et seq.

SHEPHERD v. ROBERTS. Lincoln's-Inn-Hall, same day. S. P.

[If a person submits to answer he must answer fully; and must set forth an account, though he deny the plaintiff's title.] (1)

COOKE was concerned in two partnerships, one with Kilner, another with Wilkinson, and carried on a separate trade: a separate commission of bankruptcy issued against him, under which he obtained his certificate.

The bill was by the plaintiff, for an account of another trade, in which plaintiff claimed to be a partner, and which was carried on in the names of *Shepherd and Co.*

By answer, Cooke set forth, that the plaintiff was a day-laborer, and had nothing to do with the business, which was only a negotiation of notes, in the names of *Shepherd and Co.*

Exceptions being taken to the answer, it was reported sufficient, and an exception being taken to the Master's report,

Lord CHANCELLOR allowed the exception, on the ground that the defendant should have pleaded that the plaintiff was not a partner. (2)

(1) See the preceding case and references in the Editor's note. Although several decisions took place contrary to this doctrine (*Jacobs v. Goodman*, *postea*, 487, note; *M. Donegal v. Stewart*, 3 *Ves.* 446; *Phillips v. Caney*, 4 *Ves.* 107), it afterwards became quite settled, *ut supra*. See *Dolder v. Lord Huntingfield*; *Faulder v. Stewart*; *Shaw v. Ching*, 11 *Ves.* 285, 296, 303; *Somerville v. Martin*, 16 *Ves.* 382. The whole doubt seems to have arisen from the long prevalent misapprehension above alluded to, in the preceding case, that a plea of no partnership was bad, as a negative. Lord Thurlow himself fell into the error, but afterwards corrected it. See the whole subject treated in a most masterly manner by Mr. *Beames*, El. Pl. 120, 121, 122, 123, et seq.

(2) Settled acc. *Beames*, El. Pl. 120, et seq.

[*240]

*EASTER TERM.

31 Geo. 3. 1791.

DOCKER v. HORNER. [Vide S. C. 2 Dick. 746.]

Prerogative probate necessary, for the Accountant-General to pay money out of Court. (1)

AN estate had been sold for payment of debts, and the money had been paid into Court.

Mr. *Mansfield* moved, that the Accountant-General might pay some debts, one of 42*l.* the other 43*l.*, without the parties producing a prerogative administration to the creditor, they having produced an administration in the court of the Bishop of Litchfield, where the assets were; but the Accountant-General had refused to pay without a prerogative administration, the practice of the office being, not to pay more than 30*l.* without, though they paid inferior sums, upon the probate of the ordinary of the diocese only.

But Lord CHANCELLOR refused the motion, saying, that the practice must be uniform. (1)

(1) It is indispensable, however small the sum. See the principal case in 2 Dick. 746, et seq.; *Challnor v. Mushall*, 6 Ves. 118; *Newman v. Hodgson*, 7 Ves. 409; *Thomas v. Davies*, 12 Ves. 417.

RHEEDER v. OWER.

(Reg. Lib. 1790. B. fol. 375.)

Testator ordered the interest of the residue to be paid to his sisters for life, and in case any of them should die leaving issue, then to transfer the principal of the residuum, to the children of the sister so dying, at twenty-one. One of the sisters died in the life of the testator: her children shall take her share.

JOHN MITCHELL, possessed of considerable personal estate, made his will, bearing date 31st August, 1789, whereby, after giving a legacy to one of his sisters, he gave the residue to the defendants, his sister Elizabeth Ower and Jonathan Hitchins, whom he directed to sell his leasehold house, and to lay the money, which should be produced by the [*241] sale, and his whole **residuum*, in the funds, and to pay the interest thereof unto his sisters, Elizabeth Ower, Mary Blackburn, Ann Holdgate, Margaret Kettlewell, and Lydia Norton, equally between them, for and during the term of their natural lives, for their sole use and benefit, and on further trust, that in case any of his said sisters should die, leaving issue, that the trustees "do and shall pay, assign, and transfer the share or proportion of the said **residuum*, to which my sister so deceasing, was entitled, at or before the time of her decease, to receive the interest and dividends thereon, unto and amongst all and every such child or children of such deceased sister, equally between them, share and share alike, at their respective ages of twenty-one years." The testator died 13th Feb. 1790, leaving four of his sisters surviving him, but Ann Holdgate, the other sister, had deceased in the lifetime of the testator, namely, in November, 1789, leaving the plaintiffs, William Rheeder and Martha Jennings, her children, her surviving; who had attained their ages

of twenty-one years, and they were the only other next of kin of the testator.

The plaintiffs filed their bill against the executors, the surviving sisters, their husbands, and children, claiming to be entitled to one fifth of the *residuum* of the testator's personal estate, as children of the deceased sister, and insisting, if they were not so, that the testator had died intestate, as to that one fifth of his personal estate.

Mr. *Solicitor-General* stated the words of the will, and argued, that the intention of the testator must have been, to give the property to all the sisters and their children, notwithstanding the words seemed to exclude the sister who died in his lifetime.

Mr. *Mansfield*, on the contrary, contended, for the defendants, that in order to take, the children must be children of such sisters as would be entitled to take the interest and dividends during their lives.

But Lord CHANCELLOR thought the plaintiffs were entitled to this as an executory devise, and that, in a will so loosely drawn, it was more probable that was the testator's intent than the contrary. (1) (a)

(1) The matter seems to have been compromised soon afterwards, for the plaintiffs dismissed their bill with costs on the 31st of May. — R. L. ubi supra.

(a) See *Bridge v. Abbot*, ante, 224, 227, and cases cited in the notes.

***FORSYTH v. GRANT.** [13th May.] [S. C. 1 Ves. jun. 298.] [*242]

(Reg. Lib. 1790. A. fol. 401. b.)

Testator enters into a marriage bond, to leave 2000*l.* to the wife and children, but if no children, then to the wife; by will he gives her a life-estate in his whole property; she shall not be put to an election, but take both. (1)

WILLIAM GRANT, the testator, by a bond made by him, dated 26th February, 1761, previous to and in contemplation of his marriage with the defendant, Gratiana (then Gratiana Land, spinster), became bound to Barton Land (since deceased) and the defendant, Henry Land, in the sum of 4000*l.*, with a condition thereunder written, reciting the intended marriage, and that, in consideration thereof, and of said Gratiana's fortune, the said William Grant had agreed to leave to the said Gratiana Land, his then intended wife, or the child or children of the marriage, the sum of 2000*l.*; the condition of the said bond, therefore, was, that if the marriage should take effect, and if the heirs, &c., of said William Grant, should, within three months after his decease, pay to the trustees, &c. the sum of 2000*l.* in trust, that the trustees, &c. should place out the same at interest, and, in case there should be any children, should then pay the interest in manner therein mentioned, or if there should be no child or children living at the death of the said William Grant, in trust, as to the said principal sum of 2000*l.* for the sole use and benefit of the said Gratiana Land, then the bond to be void.

The marriage was solemnized, but there was no issue of the marriage. Barton Land died, leaving his co-trustee surviving him.

(1) The principle in this case seems to be, that the two provisions were so different, that nothing was apparent on the instruments excluding the widow from either of them. See *Jeacock v. Falconer*, ante, 1 vol. 295, 296, with the notes, *ibid.* And the notes to *Pearson v. Pearson*, *ibid.* 292.

William Grant afterwards made his will, by which he gave to some of the defendants all the estate, real and personal, he was then or might happen to die possessed of in trust, and appointed his trustees, to pay to his beloved wife, Gratiana Grant, the annual rent of yearly profits of all his said estate, real and personal, yearly and every year, by equal portions, and after her decease, to divide the estate among the plaintiffs.

The question was, whether the wife was to be put to an election between the sum secured by the bond, and her life-estate under the will.

Mr. *Solicitor-General*, for the plaintiffs, contended that the intention of the testator was, to give her an option between the two.

But Lord CHANCELLOR held she should take both.

[*243] *BOYLE v. The Bishop of PETERBOROUGH, and Others.

[13 and 17 May.] [S. C. 1 Ves. jun. 299.]

(Reg. Lib. 1790. A. fol. 363.)

Power to divide a fund among all and every the children, to be vested at twenty-one, and in default or part execution, the whole, or part unappointed, to go to all; there were two children, a son and a daughter: a partial provision was made for the son, who died unmarried, and without issue: a subsequent appointment of the whole residue to the daughter, is a good execution of the power. (1)

LADY Frances Coningesby, plaintiff's late grandmother, by will, dated 26th September, 1770, gave the residue of her personal estate, after payment of debts and legacies, &c. to Lord Southwell, and the defendant the bishop, their executors and administrators, in trust, to permit testatrix's daughter, Charlotte Boyle Walsingham (plaintiff's mother) to take the dividends, &c. for life, to her sole and separate use; and from and after her death, to pay, assign, and transfer the whole residue unto, and for the benefit of, all and every the child and children of her said daughter, Charlotte Boyle Walsingham, if more than one, in such parts, shares, and proportions, manner and form, and for such interests respectively, and with such benefit of survivorship, and other accruing interests,

(1) This decision has been repeatedly approved of and followed. See in *Butcher v. Butcher*, 1 Ves. & Beames, 91, 92, 93; *Vane v. Lord Duncannon*, 2 Scho. & Lefroy, 129; *M'Ghie's case*, 2 Madd. Rep. 368, 377. As to the general principles in cases of appointments, illusory or otherwise, see *Butcher v. Butcher*, on the Appeal, 1 Ves. & Beames, 79, et seq. which comprises all the material authorities.

Lord Eldon C., *ibid.* pp. 91, 92, 93, observes, "It has been long settled, that an appointment cannot be made to a deceased child; or to the personal representatives of a deceased child; and, therefore, before the case of *Boyle v. The Bishop of Peterborough*, it must have frequently occurred that this might happen, unless by some circuitry or device the families of deceased children were included, &c. The mode of executing the power, in the case of a deceased child, according to the old practice of conveyances, before the case of *Boyle v. The Bishop of Peterborough*, was by giving part to the surviving children; making no appointment of the residue; which, therefore, was permitted to go as in default of appointment. That certainly was very ill-contrived and incorrect."

"Lord Thurlow dissented from that, and established the rule in the case of *Boyle v. The Bishop of Peterborough*, which it is better to abide by."

Lord Redesdale C., also referring to the same subject (2 Scho. & Lefroy, 129), says, "In the case of *Boyle v. The Bishop of Peterborough*, the persons who prepared the instrument were aware of this, and two instruments were executed; the first clearly within the power, and then another as to what was left unappointed by the first, and would have been unappointed if no subsequent execution had been made. Here, I think, the appointment is to be considered exactly in the same way, for this purpose, as if contained in two separate deeds."

and to become an interest vested in such child or children, at such time or times respectively, as she, her said daughter, by any deed or deeds, writing or writings, to be by her sealed and delivered, in the presence of two or more witnesses, should direct, limit, or appoint; and in default, or in case of an incomplete appointment, then the whole, or the part unappointed, for the benefit of all the children equally, to be paid at twenty-one; and, if but one child, to such one at the same age. Nevertheless, she did thereby declare, that if it should happen, that any such child or children should attain his, her, or their age or ages of twenty-one years in the lifetime of her said daughter, then, and from thenceforth, all and every, the said share and shares of such child or children, so attaining their said ages of twenty-one years, should be considered as vested interests in them respectively; and should be transmissible to his, her, or their executors, administrators, or assigns; yet so, nevertheless, as, that the payment of the same share or shares should be postponed until after the decease of the said daughter, and then to be immediately paid. The will also contained several usual provisions, in case of children dying under age, &c. which are unnecessary to state; the testatrix appointed Sir Sidney Stafford Smyth, Mary Trevor, and George Watson, (who all died in her lifetime,) joint executors.

*Lady Frances died 21st December, 1781, leaving defendant, [*241] the bishop, one of the trustees, alone surviving her (Lord Southwell, as well as the executors, having died in her lifetime), and also leaving Charlotte Boyle Walsingham, her daughter, then a widow, surviving her; who, at the death of the testatrix, had two children, namely, Richard O'Brien Boyle, and the plaintiff, both infants; and the bishop having renounced administration, the same, with the will annexed, was granted to Charlotte Boyle Walsingham, who, by virtue thereof, collected property of the testatrix to a very large amount; to which she became entitled for life, with power of appointment, as above stated.

By deed poll of part appointment, in writing, duly executed as required by the will, Charlotte Boyle Walsingham did, by virtue of the power, appoint 4500*l.* 4 per cent. bank annuities, part of the said residue, to her son, Richard O'Brien Boyle, to vest in, and be transferable and appropriable to him, immediately after her death. And in the deed is contained a proviso, that nothing therein contained should be deemed to annul, or make void, the power of appointment given by the said will, as to the remaining part thereof; and that in case the said Charlotte Boyle Walsingham should die, without making any appointment respecting the same, the said 4500*l.* annuities should be taken by said Richard O'Brien Boyle, in part of his share, that he might not, in default of appointment, take more than one moiety of the residue. Afterwards, Charlotte Boyle Walsingham, having given up her life interest in the said 4500*l.* annuities, they were sold; and the produce, being 3880*l.* 18*s.* 6*d.* was applied in the purchase of a commission in the army, for the benefit of the said Richard O'Brien Boyle. Afterwards, said Richard O'Brien Boyle, becoming of age, by deed, declared that the money so advanced was in part of his share of the residue of testatrix's estate. By a subsequent deed, 811*l.*, the produce of Mr. Boyle's cornetcy, which was sold at the time of purchasing the superior commission, was returned into the general fund.

Before any further appointment was made, Richard O'Brien Boyle died, without issue, and unmarried.

Afterwards, by deed poll of further appointment, 22d April, 1789, under the hand and seal of Charlotte Boyle Walsingham, *de- [*245]

clarifying the state of the funds which constituted the residue, and the death of Richard O'Brien Boyle, as aforesaid, leaving his sister, the plaintiff him surviving, and then the only child of Charlotte Boyle Walsingham; and, that she was desirous of executing her power; it was witnessed, that, in pursuance of the power, the said Charlotte Boyle Walsingham did direct that the then trustees, and such persons who should, for the time being, be the trustees, should stand possessed of the same, subject to the interest of said Charlotte Boyle Walsingham for life, in trust for the plaintiff, and all and every other, the child or children which the said Charlotte Boyle Walsingham should or might, at any time hereafter, have, or for any one or more of them, the plaintiff and such other child or children, either wholly, or in such parts, shares, and proportions, and for such absolute or limited interests, and in such manner and form, and to become an interest or interests vested and payable at such times respectively, and with such allowance for maintenance in the mean time, and with such benefit of survivorship, and other accruing interests, as the said Charlotte Boyle Walsingham by deed or will should appoint; and in default of appointment, and subject to the same, certain of the funds should become an interest vested in the plaintiff, from and immediately after the date of the said instrument; and should be transmissible to her executors, notwithstanding her death in the lifetime of the said Charlotte Boyle Walsingham; with proviso, that nothing therein contained, should prejudice a further appointment, with respect to the remaining part of the residue.

By another deed poll, 27th April, 1789, reciting the above transactions, Charlotte Boyle Walsingham directed that the trustees should stand possessed of 10,000*l.* new 4 per cent. bank annuities, and all other the residue of the personal estate of Lady Frances Coningesby, concerning which no direction or appointment had been made, subject only to the life estate of Charlotte Boyle Walsingham, in trust for the plaintiff, and all and every other the children which Charlotte Boyle Walsingham might thereafter have, in such shares and proportions, manner and form, and to become an interest or interests vested, at such times, and with such allowances, or otherwise, and with such benefit of survivorship, and other accruing interests (omitting "for such absolute or limited interests") as the [*246] said Charlotte Boyle Walsingham, by deed or will, *to be executed as therein mentioned, should direct or appoint; and in default of such appointment, equally in shares, &c. as directed by the will of Lady Frances Coningesby, in case of said Charlotte Boyle Walsingham not executing the power; and subject, as aforesaid, in trust for plaintiff, her executors, administrators, and assigns, to be a vested and transmissible interest in her, subject as aforesaid immediately after the execution of said deed.

Richard O'Brien Boyle before his death duly made his will, and thereby reciting that he was entitled to an estate in the county of Essex, and also in reversion, after the death of his mother, to one moiety at least, of the residue of the personal estate of his grandmother, Lady Frances Coningesby, gave, devised, and bequeathed the same to the defendants, Lord Mulgrave, John Fitzgibbon (now Lord Fitzgibbon), and Henry Phipps, in trust to sell the estate, and apply the produce of it to pay debts; and in case it should prove a deficient fund for that purpose, in trust, to apply so much of his share of the residue of his grandmother's personal estate, as would be sufficient to make up the deficiency: he then gave several other legacies, and as to the rest and residue of his grandmother's estate, it was

his will, that his trustees should be possessed thereof in trust for the plaintiff and her children, if she should have any in the manner there pointed out. And he gave a real estate, in Ireland, to his sister the plaintiff for life; remainder, to her second son, in tail; remainder to her third, fourth, and every other younger son in succession, in tail; and for default of younger sons, to her first son in tail; and in case his sister should die without issue male, living at the time of her death, and no such issue male of his sister should attain twenty-one, then to vest absolutely in the defendant, the Earl of Shannon. And, in case his sister should contest his bequest to the said Earl of Shannon, then his will was, that his sister and her issue should take no benefit by the bequest therein made to them respectively, but that Lord Shannon should be entitled absolutely to the residue of his share of his grandmother's personal estate; and appointed his trustees executors, who proved the will.

By indenture of settlement, made after the marriage of Charlotte Boyle Walsingham, plaintiff's mother, with the Honorable Robert Boyle Walsingham, bearing date 27th November, 1776, and *made be- [*247] tween the said Robert Boyle Walsingham and Charlotte Boyle Walsingham of the one part, and the defendant the bishop, and Charles Dunbar, Esq. of the other part, reciting, that by the marriage-settlement of Sir Charles Hanbury Williams with Lady Frances Coningesby, 5000*l.* was vested in Charlotte Boyle Walsingham, as one of the daughters of the marriage; and that Richard Boyle Walsingham had agreed that the same should be vested in trustees, as a provision for said Charlotte, and her issue, it was witnessed, and Robert Boyle Walsingham, and Charlotte Boyle Walsingham, assigned the same to the trustees, to hold the same, in trust to permit Robert Boyle Walsingham to have the proceeds for life, and after his decease, in trust to permit Charlotte Boyle Walsingham to receive the proceeds, and after the decease of the survivor to pay the said 5000*l.* to and among all and every the child or children, in such parts, shares, and proportions, and in such manner and form, and at such time or times respectively, as the said Robert Boyle Walsingham and Charlotte his wife, at any time during their joint lives, or the survivor of them during his or her life, by any writing or writings, under their hands and seals, or under the hand and seal of the survivor of them, attested by two or more credible witnesses, should order, direct, limit, or appoint; and in default of such appointment, or as to such part of said 5000*l.* of which no appointment should be made, in trust to distribute the same amongst all and every such child or children, in equal parts, shares, and proportions (if more than one), the same to vest in, and be paid to, the sons at twenty-one, and the daughters at twenty-one, or days of marriage after eighteen; and if only one child, to vest in that one, at the same time; and reciting, that, under the will of the Countess of Kildare, the said Frances Boyle Walsingham would, in case she should survive her mother, be entitled to 4000*l.*, and the residue of the said Countess's personal estate, which was then vested in the funds (in case Charlotte Boyle Walsingham should survive Lady Frances Coningesby), Robert Boyle Walsingham covenanted to assign the same to trustees, to the same uses.

This property was now become vested in the defendants, the bishop, and Lord Walsingham.

Robert Boyle Walsingham died many years ago, and Charlotte Boyle Walsingham, by her will, 7th July, 1789, duly executed under the settlement, by virtue, and in exercise and execution *of the said [*248] settlement, and of all other powers and authorities, directed, that from and immediately after her decease, the defendants the bishop and

Lord Walsingham, should stand possessed of the whole of the said funds, upon trust for the plaintiff, her daughter and only child, her executrix, her surviving; and the plaintiff proved the will, and obtained letters of administration *de bonis non* of the personal estate of Lady Frances Coningesby, by which she became their personal representative; in which capacity, and also as only next of kin of her brother Richard O'Brien Boyle, she filed her bill against the defendants, the bishop and Lord Vernon, as trustees of the residue of Lady Frances Coningesby's estate, the bishop and Lord Walsingham, as trustees of the property settled by the indenture of 27th November, 1776, and against the other defendants, the executors of Richard O'Brien Boyle and Lord Shannon, his devisees and legatees, praying to have her right to the trust fund declared, an account of what is coming due to her, and that the same may be paid and transferred to her.

The testatrix, Charlotte Boyle Walsingham, died 12th April, 1790, without revoking the will, or making any other will, or appointment, and without having had any other issue, and leaving plaintiff her only child, her executrix, her surviving; and the plaintiff proved the will, and obtained letters of administration *de bonis non* of the personal estate of Lady Frances Coningesby, by which she became their personal representative; in which capacity, and also as only next of kin of her brother Richard O'Brien Boyle, she filed her bill against the defendants, the bishop and Lord Vernon, as trustees of the residue of Lady Frances Coningesby's estate, the bishop and Lord Walsingham, as trustees of the property settled by the indenture of 27th November, 1776, and against the other defendants, the executors of Richard O'Brien Boyle and Lord Shannon, his devisees and legatees, praying to have her right to the trust fund declared, an account of what is coming due to her, and that the same may be paid and transferred to her.

The defendants, Lord Mulgrave, Lord Fitzgibbon, and Henry Phipps, the executors of Richard O'Brien Boyle, insisted, by their answer, that the appointment made by Charlotte Boyle Walsingham was not a good execution of the power reserved to her by Lady Frances Coningesby's will, and the settlement; and that the plaintiff is entitled to no more than a moiety, the other moiety having vested in their testator. Lord Shannon submitted, whether the appointments were good as far as they related to Lady Frances Coningesby's residue. The other defendants were only made so as trustees of the fund.

The cause came on to be heard on Friday, the 13th, and Tuesday, 17th of May.

Mr. Solicitor-General, Mr. Mitford, and Mr. King, for the [*249] plaintiffs, contended that the appointments were good. There *is no doubt that the first instrument in favor of Mr. Boyle was a good execution of the power, as far as it extended. Then, he dying without issue, Mrs. Boyle Walsingham made a partial appointment in favor of her daughter, and afterwards, an appointment of the whole likewise in her favor, but with power to make a new disposition. The only questions are, Whether Mrs. Walsingham had such power; and, secondly, Whether she has executed it. A person having such a power may execute it, although one of the objects of the power be dead; otherwise, in all cases of powers to divide among children, the death of one child would extinguish the power. But it was held in *Maddison v. Andrews*, 1 Vesey, 57, the death of one of the objects did not affect the execution of the power; and that though the appointment to the daughter, who was dead, was void, the other appointments were good. The next question is, Whether she has exercised this power improperly. She seems to have made the properest appointment possible. The son being dead without issue, she has made an appointment to the daughter. She had before executed an instrument, making a provision for the son; then, after his death, she makes a provision for her daughter, and any children she might herself afterwards have. The only objection that could possibly be made, would be that she had made an improper appointment; but considering how extensive her power was, no such objection could be made, unless they can show, on the other side, that the death of Mr. Boyle precluded any ap-

pointment. But this could not be; she might have, originally, made an appointment, that the share given to Mr. Boyle should, in case of his death, go to Miss Boyle; for she had a power to give a limited interest, with such benefit of survivorship as she should think proper. Now, if she had appointed moiety to each, with survivorship between them, that would certainly have been good; and if she has done no more than that, it must be a good execution of her power. What she has done, is exactly equivalent to such an appointment; for, after the death of Mr. Boyle, there was no object upon which to execute the power, but Miss Boyle; and the power must be argued upon as it was circumstanced when executed, she having her whole life to execute it in. Any appointment she could have made, would have been defeasible by subsequent births of children. In *Chadwick v. Doleman*, 2 Vern. 528, where the second son became eldest, the Court thought the first *appointment [*250] defeasible. Then it is said, the appointment was to be to all and every the children. If she executed her power when there was only one child, that child was all and every. This will go to both the appointments; there is no material difference between them. There was an appointment in favor of Mr. Boyle, which was not illusory.

Mr. *Attorney-General*, for the executors of Mr. Richard O'Brien Boyle.

The appointment in this case, does not appear to be agreeable to the power. This is for the benefit of all and every of the children if more than one, and in default of appointment, or in case of an incomplete appointment, then the whole, or the part unappointed to be for the benefit of all the children equally, at twenty-one; and, there is a proviso, that the shares shall vest in children attaining twenty-one, in the lifetime of Mrs. Walsingham; the interest is to vest and be transmissible to their representatives; though what the sum would be, would remain uncertain, as Mrs. Walsingham had her whole life to execute the power. Suppose there had been five or six children, and two or three had died in the lifetime of Mrs. Walsingham, after having attained their ages of twenty-one, it could not be in Mrs. Walsingham's power to have appointed to the living children only.

Lord CHANCELLOR. Would an appointment to the representatives of the dead child be a good appointment? (2)

Mr. *Attorney-General*. Her business would only be to name the sums that had already vested at twenty-one.

Lord CHANCELLOR. What sort of conveyance could she make? One question is, whether such a power, without special words, would vest any thing in the lifetime. Would an instrument applying to the representatives of a dead child be a valid instrument?

Mr. *Attorney-General*. In *Maddison v. Andrew*, there was an appointment to the dead child, and the objection there made was, that, in fact, it was an appointment to the mother herself, who was the representative; and did not turn on any presumed *impossibility of appoint- [*251] ing to a dead child: but my argument turns on the special directions in this will; after attaining the age of twenty-one, Lady Frances has only left Mrs. Walsingham the power of naming the sums. The representatives of a dead child may, certainly, be put, in such a power, in the place of the dead child, if the testator thinks proper so to do: here the intention is particularly pointed to, by postponing the payment to the

(2) Vide note (1), ante, p. 243.

death of Mrs. Walsingham; the plain import of which is, that in the case that has happened, an interest vested in Mr. Boyle at twenty-one. Then as to the power under the settlement, that is, to distribute the funds among *all and every* the children; it is a contradiction to the power, if the appointment can be to Miss Boyle only. The executors of Mr. Boyle have, therefore, a claim to a moiety of both funds. With respect to the appointment of the 4500*l.* stock being an execution of the power, 817*l.* of it was brought back, by another deed, into the power of Mrs. Walsingham; her recalling that part, is inconsistent with the idea of its being an appointment; she, having executed her power by the instrument, had precluded herself from taking it back. But considering it as an appointment if the clause in Lady Frances Coningesby's will applies to the subject, see what has been done; out of between 60 or 70,000*l.*, Mrs. Walsingham has appointed about 3000*l.* (the value of the stock) to the son. Such a share has always been held elusory. If Mr. Boyle was now suing, it could not be held a good execution of the power. And his representatives have the same claim as he would have had, if he were alive; as, by Lady Frances Coningesby's will, Mrs. Walsingham was under a necessity of making a provision for him.

LORD CHANCELLOR thought the taking back the 817*l.* as it was not for her own benefit, but thrown into the general fund, and subject to further appointments, was immaterial.

Mr. *Hardinge*, and Mr. *Hollist*, for Lord Shannon. We contend that, if Mrs. Walsingham had a power of appointing after her son's death, the exercise of that power must be with a view to there having been two children, and that the execution of it, in the manner this was done, was elusory, and a deceit upon the power. But we contend, that, after Mr. Boyle's death, all the power was gone, and his interest became a vested interest in a moiety only, subject to a fair appointment in his life-[*252] time. The *clause in the will of Lady Frances vesting the interest refers to the contingency of Mrs. Walsingham's living. The several clauses are independent of one another. By the first, the children were to have the whole after Mrs. Walsingham's death. The second clause provides for the non-execution, or part execution, of the power. The third, that if a child attain the age of twenty-one, in the lifetime of the mother, the share should be vested, subject to her declaration as to the quantity of the share. If the appointment by the mother after the son's death, be good, it must be with a view to there being two children, otherwise if a shilling had been given to him, that would have enabled the mother to give 70,000*l.* to the daughter. It is true, as Mr. Mitford argued, she might have appointed a moiety to each, with remainder to the other, in case of dying unmarried; but Mr. Mitford, in order to make this argument apply, was obliged to state it as an appointment of a moiety. But in the present case, the appointment to the son is not of more than a nineteenth part, which is much less, than has been held to be elusory. In the case of *Wall v. Thurborne*, 1 Vern. 355, a case is cited of *Cragrave v. Percost*, where a man having two daughters, one by a former, and another by a second wife, gave his estate to his wife, to be by her distributed between his daughters, as she should think fit; she gave 1000*l.* to her own daughter, and but 100*l.* to the other, and, on the mere disparity of the sum, it was held elusory, and an equal distribution was decreed; and Lord Hardwicke, in *Maddison v. Andrew*, argued from this case. So in *Paolet v. Paolet*, 1 Wils. 224, 29,900*l.* out of, 30,000*l.* applied to one child was held void. The power of appointment among children, must be

exercised by a discretion operating upon all. It is given for the purpose of insuring the obedience of the children. It may be the case of two, or the case of ten, and surely if, of a large number, one dies after the interest is vested, a gift to the others could not be good. In the case cited by Mr. King (*Chadwicke v. Doleman*) there was no vested interest. One great difficulty which arises in this case is, what could be done, supposing no appointment to have been made, during the life of both: Is it the rule of the Court, that something shall be done for the dead child? to say that he is to be kept out, seems strange; and, therefore, it necessarily follows that the power is at an end. Suppose an elusory execution made in the lifetime which the parent meant to correct, or that being fair when made, if afterwards it becomes otherwise, and the child being dead, [*253] it cannot be amended, it follows, that as no fair appointment can then be made, the power must be gone. The whole turns upon the clause, that if one child should die without issue, the other should take that share; for we admit the parent could not give to the representative. In *Maddison and Andrew*, no right was vested, but here the interest was vested by the clause in the will, which supposes the appointment to have been made. In *Cholmondeley v. Meyrick*† it was held, that the interest was vested, though the sum was uncertain: but, here, his interest was a vested interest in a moiety, subject to be diminished by the birth of other children. The gentlemen on the other side, go upon there having been an appoint-

† *Cholmondeley and Meyrick*, (3) in Chancery, 20th April, 1758. In this case the trust term of 300 years, to commence at the death of Charles Cholmondeley, was,

"If there should be an eldest or only son, and only two other children, then the sum of 6000*l.* for the portions of such two other children, the said several sums, for the portion or portions of such daughter or daughters and younger son or sons, to be raised and paid to him or them, at such time or times; and in case there should happen to be more than one child, besides an eldest son, then in such shares, proportions, and manner, as the said Charles Cholmondeley, by deed or writing, to be by him duly executed in the presence of two or more credible witnesses, or by his will should direct, limit, or appoint; and, for want of such appointment, to be equally divided amongst them (if more than one such daughter or younger son), share and share alike, and to be raised and paid in manner following (that is to say), to such younger son and sons at his or their age of twenty-one years, or to be sooner (4) applied or employed for his or their advancement or benefit, as the said trustees should think fit, and to the daughter and daughters, at her or their respective age or ages of twenty-one years, or day of marriage, which should respectively first happen, after the decease of the said Charles Cholmondeley; or in case any such daughter or daughters should attain the age of twenty-one years, or be married, or any such younger son should attain his age of twenty-one years, in the lifetime of the said Charles Cholmondeley, then to be paid immediately after the death of the said Charles Cholmondeley, unless the same should have been raised and paid in his lifetime, which it might be with his direction. Provided, that in case any such daughter or daughters, younger son or sons, should die before his or their portions should become due or payable, or be sooner paid as aforesaid, then the portion or portions, of such of them so dying, should go and be paid unto, and be equally divided amongst, the survivor or survivors of them, when the original portion or portions, of such surviving daughter or daughters, younger son or sons, should become due and payable as aforesaid." Proviso, such younger child not to have greater portion, than limited, if no such other younger child have not been born. Proviso, if all die before any of their portions should become payable, then, the term to cease.

There were two younger children, daughters; one of them married, and died in the lifetime of the father. The question was, whether her portion vested, and so was transmissible to her representative (her husband), or survived to her sister, who survived her father.

April 20th, 1758, Lord Keeper Henley decreed Mr. Meyrick, the husband, to be entitled to the 3000*l.* which had actually become due, though the payment was postponed on account of the fund.

(3) See also particularly *Emperor v. Rolfe*, S. P. A. D. 1748, 1 Ves. 208, and Lord Eldon C.'s observations on it, and on the above case in Mr. Brown's note, in *Hope v. Lord Clifden*, 6 Ves. 507, et seq., with the other references in Mr. Eden's note, 1 Ca. temp., Lord Northington, 87, and the doctrine in *Codrington v. Lord Foley*, 6 Ves. 364, et seq.

(4) Lord Redesdale's notes here refer to *Butler v. Duncombe*, 1 P. W. 448, et seq.; and to *Lord Teynham v. Webb*, 2 Ves. 198, &c., as to the effect of such words as the above to make portions vest. His Lordship also refers to *Broadmead v. Wood*, ante, 1 Bro. 77. Vide etiam Mr. Eden's note, ubi supra, 87, and 6 Ves. 364, et seq.

[*254] ment of 4500*l.*, but, in fact, though he had *the money, that appointment was imperfect: by the appointment, it was to be transferable to him at her death, so that it never took place as an appointment; and in the case of *Maddison v. Andrew*, the Court holding, that the interest did not vest till the death of the mother, therefore, gave the whole between the two surviving children. If Mr. Boyle had lived to come here himself, the Court must have said Mrs. Walsingham had eluded the power. There is also another ground on which this execution of the power is void — that it was an immediate gift to the daughter, and, by possibility, might come to the mother, as her representative.

Lord CHANCELLOR, during the argument, said a gross inequality of division, if accounted for upon honorable motives, could not be held elusory; (5) and the question was, whether the son being dead was not a sufficient motive.

Mr. *Solicitor-General*, beginning to reply, Lord Chancellor stopped him, and spoke to the following effect;—

It would be a great deal to say that, by the death of the son, the power was gone; because if that were so here, where there were only two children, it must be so where there is a larger number.

I think, without the particular clause for vesting the shares, the fund could not *vest* (6) whilst the power remained.

The question, then, is as to the effect of the clause. It is not intended to bind down the property, but appears to me only to be intended to vest the property, in case there was no appointment.

Then the question is, whether there can remain a capacity of appointment, where there can be no power of distribution.

But I think the making an appointment is material, because, by it, she shows her intention to exercise her power, because otherwise the fund would go equally. (7)

I say nothing as to its being elusory, because I think she had the power absolutely.

The plaintiff must have a decree. (8) (a)

(5) Vide *Burrell v. Burrell*, Ambler, 660. See, however, *Pocklington v. Bayne*, ante, 1 vol. 450, and the Editor's note; more especially *Butcher v. Butcher*, 1 Ves. & Beames, 79, et seq. < See on the subject of elusory appointments, *Robinson v. Hardcastle*, 2 Bro. C. C. 23. }

(6) Lord Redesdale's notes question this, unless the word "absolutely" is understood. They refer, however, to *Loder v. Loder*, 2 Ves. 526.

(7) Lord Redesdale's notes here, again, refer to *Loder v. Loder*, 2 Ves. 552, as to an appointment including a son, who, after twenty-one, had become an eldest son. They also notice *Randal v. Metcalfe*, 6 Bro. P. C. 559 [3 vol. 318, octavo ed.]; *Willis v. Willis*, 3 Ves. 51, and *Emperor v. Rolfe*, 1 Ves. 298.

(8) The Court declared "that the power of appointment, reserved by the will of Lady Frances Coningesby, the plaintiff's grandmother, dated the 26th Nov. 1770, and the indenture of settlement, dated the 27th Nov. 1776, in the pleadings mentioned, were well executed by Charlotte Boyle Walsingham, widow, the plaintiff's late mother deceased; and that under such appointment the plaintiff was entitled to the trust funds, and moneys, in the names and hands of the defendants the several trustees." &c. — R. L.

(a) See *Sudgen on Powers* (4 Lond. ed.), 470, 499, 511, 512, 560, et seq.; *Reade v. Reade*, 5 Ves. 744; *Casterton v. Sutherland*, 9 Ves. 446. That a power of appointment does not prevent an interest in money vesting, subject to be devested, see *Cholmondeley v. Meyrick*, 1 Eden, 77; *Smith v. Camelford*, 2 Ves. jun. 698; *Reade v. Reade*, supra. And as to the application of this doctrine to real estate, see *Doe v. Martin*, 4 T. R. 39.

*WAKE v. WAKE.

[*255]

[S. C. 1 Ves. jun. 335.] Mr. J. Buller for the Lord Chancellor.

(Reg. Lib. 1790. B. fol. 683.)

Testator gives his widow an annuity (charged on an estate of which she would be dowable), she must elect between that and her dower. (1) Accepting payment of the annuity for three years, is not an election to take that in lieu of dower. (2)

THOMAS WAKE, by will, dated 1st October, 1783, gave freehold estates to the defendant, his son, of the value of 240*l.* a year (enumerating them), subject, nevertheless, and the testator charged all his said real estates with the payment of one annuity or clear yearly rent charge of 35*l.* a year to plaintiff (his widow), for and during the term of her natural life, payable by quarterly payments, and also gave her a legacy of 100*l.* out of his personal estate. The testator died 25th July, 1784.

The annuity was regularly paid to, and received by, the plaintiff, the widow, to the 1st August, 1787, and she made no further demand; but on the 6th of August, in that year, she, by her attorney, made a demand of her dower, and afterwards filed the present bill, praying an account of rents and profits of the real estates, and that she might be paid her dower thereout.

To this bill the defendants put in their answers, insisting that the annuity and legacy ought to be taken, by the plaintiff, in satisfaction of her dower, and that, by accepting thereof, she had made her election.

Mr. *Mitford*, for the plaintiffs, insisted that, supposing this to be a case of election, the widow had not made her election to take the annuity instead of her dower. In order to show she did so, her right must be explained to her, which did not appear to have been done here; she had never been called upon to execute any release. He cited the cases of *Hender v. Rose*, 4 P. Wms. 124, n.; *Pussey v. Desbouverie*, 3 Wms. 315; *Duke of Montague v. Lord Beaulieu*, 6 Bro. P. C. 232; *Boynnton v. Boynnton*, before Sir Thomas Sewall, Master of the Rolls, 15th May, 1782 (ante, v. i. p. 445, on the rehearing); and, to show that the annuity was not a bar of the title to dower, he cited *Lawrence v. Lawrence*, 1 Eq. Abr. 218, 219; *Leman v. Leman*, 8 Vin. 366; *Pit v. Snowden* (cited ante, vol. i. p. 292, n.), and took notice of *Arnold v. Kempstead*, Amb. 466; *Villa-real v. Lord Gahway*, *ibid.* 682; and *Jones v. Collier*, *ibid.* 730.

*Mr. Justice Buller thought, that, upon the authority of the [*256] cases, this was a case of election; (3) (a) but that the widow had not, by accepting the payment of the annuity for three years, made

(1) See the note and reference to *Pearson v. Pearson*, ante, 1 vol. 292, from whence it appears settled, that an intent to exclude the legal right to dower must be demonstrated by the instruments in question, or utterly inconsistent with its provisions, 2 Scho. & Lefr. 452, 453; *Lord Dorchester v. Earl of Effingham*, Coop. Ch. Ca. 319, &c. It is observable, Mr. Brown's MS. notes intimate that Lord Thurlow disapproved of this decision; and Mr. Brown refers to *Foster v. Cook*, postea, 347, 351.

(2) See in *Dillon v. Parker*, 1 Wils. Ca. Ch. 253, 268, 282, &c., and 1 Roper, Bar. & Fem. 551, 555, &c.

(3) Mr. Brown's MS. notes intimate that Lord Thurlow dissented from this. See *Foster v. Cook*, postea, 347, 351.

(a) For the cases where the widow is put to her election, see *Clancy, Rights of Women*, ch. 6, and cases there cited and commented on; *Arnold v. Kempstead*, 2 Eden, 336; *Pearson v. Pearson*, 1 Bro. C. C. 292; *Hall v. Hill*, 1 Dru. & War. 94; S. C. 1 Con. & Law, 120.

her election to take that in lieu of dower; (b) therefore decreed for the plaintiff: he added a case of *Oswald v. Anderson*, here in 1788 or 1789. (4)

(4) The widow elected to take her dower. — R. L.

(b) Upon the question of what constitutes an election, see 2 Story, Eq. Jur. ch. 30, § 1097, 1098, and cases cited; *Clay v. Hart*, 7 Dana, 6; *Northumberland v. Granby*, 1 Eden, 489; *Buttrick v. Broadhurst*, ante, 88; S. C. 1 Ves. jun. 171; *Freke v. Barrington*, post, 274.

CATTELL v. MONEY. [3d June.]

Mr. J. Buller for the Lord Chancellor.

(Reg. Lib. 1790. A. fol. 388. b.)

A sum of money being in court, to be laid out in lands which, when purchased, would be subject to bond debts of testator; the debts decreed to be paid out of the fund in court.

THE testator, James Money, being indebted to the plaintiffs by bond, by will, dated 20th April, 1785, in the first place, willed and directed that his legacies and funeral expenses should be fully paid and satisfied, and charged his real estates with the payment thereof, and gave the same to defendant, his eldest son, for life, with remainder to trustees to preserve contingent remainders, remainders to the defendants, his grandsons successively for life, with remainder over, and directing that his 8000*l.* 3 per cents. should not be applied in payment of a mortgage upon his real estate, gave the residue of his personal estate, subject to the payment of his debts, legacies, and funeral expenses, to his son William Money.

The personal estate not being sufficient to pay debts, an act of Parliament passed, in the thirtieth year of his present Majesty's reign, for vesting a part of the freehold estates in trustees, to be sold, and for laying out the money to be raised by the sale in other lands, to be settled to the same uses, reciting the will, and the death of testator, leaving William Money his son and heir, and that the said William Money had six sons (defendants), all under twenty-one years of age, and that William Money was desirous the lands therein mentioned should be sold, and had contracted with the Earl of Warwick for the purchase thereof, for the price of 20,000*l.*, but that, on account of the limitations in the will, and the infancy of the sons of William Money, the sale could not be effected without the aid of Parliament; it was enacted, that the premises should be vested in trustees, to the intent that, upon payment, by Lord Warwick, of the purchase-money into the Bank of England, the trustees should convey the premises to him in fee, and that the trustees [*257] should, out of the purchase-money, pay the expenses *of procuring the act, and lay out and invest the residue in land, to be settled to the same uses with the lands to be sold.

Lord Warwick completed the purchase, and paid the purchase-money into the Bank.

The bill prayed, that the plaintiff's bond-debts might be paid out of the money so lying in the Bank.

Mr. Mansfield, for the plaintiffs, argued, that it would be much more convenient to all parties to have the debts paid out of the money in the

Bank, than to have it laid out in land, which would be liable to be again sold for the payment of debts.

Mr. Justice *Buller*, sitting for Lord Chancellor, decreed them to be so paid.

KENTISH v. KENTISH. [3d June.]

Mr. J. Buller for the Lord Chancellor.

(Reg. Lib. 1790. A. fol. 471.)

A general charge [by introductory words] (1) upon land for payment of debts. Where testator had freehold and copyhold, the copyhold liable. (2)

TESTATOR, seised of freehold and copyhold estate, by his will said, "First, I will that all my just debts shall be in the first place paid and satisfied; Item, I give and bequeath unto [James] Green, and [Dorothy Addison, and to the survivor of them, his or her heirs,"] part of his freehold and copyhold estates, [upon trust to sell after the death of his wife, &c.]

The testator afterwards sold all his freehold and part of his copyhold estates, by which he left only copyhold at the time of his decease.

The personal estate being deficient, the bill prayed that the copyhold should be said for payment of debts.

And Mr. Justice *Buller* held the copyhold to be sufficiently charged. (a)

(1) See *Coombes v. Gibson*, antea, 1 vol. 273, and the Editor's notes (1) and (2).

(2) See, accordingly, *Coombes v. Gibson*, antea, 1 vol. 273, 274, and the Editor's notes. As to which it is observable here, that although the liability of copyholds extends to those which are unsundered (see also *Byas v. Byas*, 2 Ves. 164), there is a distinction in the marshalling or application of such estates. It appears, that freeholds and surrendered copyholds are applied, in the first instance, rateably *inter se*; and that unsundered copyholds shall not be applied, until they have been exhausted. See *Growcock v. Smith*, 2 Cox, Ca. Ch. 397.

(a) This case resembled that of *Coombes v. Gibson*, antea, vol. i. 273, in the circumstance mentioned by Mr. Richards, in *Judd v. Pratt*, 13 Ves. 172, of there being no freehold. Where a testator having both freehold and copyhold, surrendered to the use of his will, charges all his real estate, the freehold and copyhold shall contribute rateably, *Growcock v. Smith*, 2 Cox, 297. *Secus*, where he has not surrendered the copyhold, as established in *Mallabar v. Mallabar*, Forr. 79, and several other cases cited, 3 P. W. 97, n., overruling the contrary determination in *Harris v. Ingledew*, ib., for the reasons of which, see a most luminous account in the judgment of the Lord Chief Baron, in *Hellier v. Tarrant*, Forr. (3d edit.) 288, n. For the cases upon the subject of supplying surrenders, vide *Lindopp v. Eborall*, ante, 188; *Bixby v. Eley*, vol. ii. 325. As to the act of the 55 Geo. 3, c. 192, vide *Carew v. Askew*, ante, vol. iii. 56; *Pike v. White*, post, 286.

The cases in which debts were held charged upon real estate by force of introductory words, were much considered in the late cases of *Powell v. Robins*, 7 Ves. 200; and *Noel v. Weston*, 2 Ves. & Bea. 271, the latter of which resembled the present case, and *Coombes v. Gibson*, supra, in the circumstance of its relating to copyhold. For the cases upon the subject, vide *Batson v. Lindegreen*, antea, vol. ii. 94. — *Eden*. < *Ram on Assets*, ch. 4, § 2, p. 67, 60. >

[*258] *SOUNDY v. BINYON. Rolls, 8th June.

(No Entry.)

When stock is left to pay the interest to plaintiff for life, and then, after payment of gross sums, the residue to him, the Court will not permit the security to be lessened by laying out a certain sum to secure the legacies, and paying the residue immediately to the plaintiff.

By settlement, previous to the marriage of the plaintiff with Sarah Varton, his late wife, 3000*l.* bank stock, part of the fortune of the wife, was transferred to trustees, in trust that, in case Sarah Varton should die in the lifetime of the plaintiff, and there should be no children or child of the marriage (which was the case), the trustees should transfer the stock to such uses, &c., as Sarah Varton, notwithstanding her coverture, should by deed or will appoint.

Sarah Varton, then the plaintiff's wife, by will, dated 3d May, 1787, by virtue of the power reserved by the settlement, appointed the 3000*l.* stock, to the plaintiff, to be had, held, and enjoyed by him, for his life, and to be transferred to him accordingly; and after his decease, appointed the sum of 1000*l.* to be laid out and invested for the benefit of his cousin, Susannah Padbury, and the sum of 500*l.* for the benefit of her cousin, Edward Binyon and Mary his wife, for life, with remainder over, and 400*l.* for the benefit of Thomas Tilson, and 200*l.* for the benefit of Mary House for life, with remainder over, and 200*l.* to be paid to her sister-in-law, Elizabeth Soundy, and as to the residue of the 3000*l.* stock, the testatrix gave the same to the plaintiff, his executors, administrators, and assigns, and made him sole executor.

500*l.* of the stock was afterwards sold out, and the money lent on mortgage, the uses of which were declared to be the same as those of the bank stock.

The testatrix died soon after, and the plaintiff proved the will, and having occasion for the residue of the remaining 2500*l.* stock, applied to the trustees to dispose thereof, and out of the money to arise therefrom, to invest the pecuniary legacies, amounting to 2300*l.* in the funds, in order that the plaintiff might receive the interest for life, and then, that the capital might be secured for the legatees, and to pay the residue to the plaintiff, for his own use: and upon refusal, filed the present bill, praying, that the stock might be sold, and the money might be paid into the bank, in the name of the Accountant-General, in trust in the cause, and invested to the same uses, and the residue paid to him.

[*259] *The defendants, the legatees, by their answers, claimed their legacies, and prayed they might be secured.

Mr. *Lloyd*, and Mr. *Brown*, for the plaintiff, contended, that if a sufficient sum was laid out to secure the legacies, the legatees would not be injured; that, at the present value of bank stock, there was nearly double what was necessary to secure the legacies, to which surplus the plaintiff was entitled; and the latter cited a case of *Drinkwater v. Whitham*, at the Rolls, 14th February, 1778, where Drinkwater, by his will, gave to trustees 6700*l.* 3 per cents., and also all his other money in the funds, in trust, to pay his wife 200*l.* per annum for her life, and in case of her death without children, he gave the whole principal to his nephew, Sandilane Drinkwater, and made him residuary legatee. The testator died without issue, and was possessed, at the time of his death, of the 6700*l.* 3 per cents., and also of 4300*l.* 4 per cents., which sums were transferred to the trustees, to secure the payment of the annuities. S. Drinkwater applied

to the trustees for the 4400*l.*, as the other fund appeared sufficient to secure the annuity. The trustees let him have 400*l.*; he afterwards applied for the remaining 4000*l.*, but they refused to transfer it to him, without the consent of Mrs. Drinkwater, who was applied to, but refused, as it was lessening her security. S. Drinkwater filed his bill against her and the trustees, and, upon the hearing, his Honor directed the trustees to transfer the 4000*l.* to him, and that Mrs. Drinkwater should be at liberty to apply to the Court, at any time, in case any appearance of deficiency should happen thereafter.

His Honor took time to consider of this case; and, this day, said the case cited did not apply, as it was only to set aside sufficient to pay an annuity; but that the same thing had never been done, when it was to secure gross sums. It would be to take away part of the security, as the stocks may fall, and not be sufficient, at the death of the plaintiff, to pay the sums charged; and, therefore,

Dismissed the bill.

*The GOVERNOR and COMPANY of the Bank of England [*260]
v. MOFFAT and Others.

[Vide 5 Ves. 668, and note.] Lincoln's-Inn-Hall, 10th June.

(Reg. Lib. 1790. A. fol. 515.)

Though a residue is specifically given, the bank has no right to restrain the executor from transferring the funds. (1)

JAMES MOFFAT, Esq., being possessed of a very large personal estate, and particularly of a large sum in the several public funds, made his will, dated 8th August, 1790, and thereby, after sundry specific and pecuniary legacies, gave "all the rest, residue, and remainder of his personal estate not therein disposed of, to his wife Elizabeth Moffat, Jeremiah Roydes, and John Forbes (three of the defendants), and the survivors and survivor of them, and the executors and administrators of such survivor, upon trust, to sell such part of the residue as should not be ready money, or be laid out and invested in the public stocks or funds, or upon government and real security, and to collect and get in debts which should be due to him, and to lay out and invest the money arising therefrom, in such like stock or funds, or upon government or real securities at interest, and, from time to time, to alter, vary, transfer, assign, and dispose of such stocks, funds, or securities; and the money arising thereby, to lay out and invest in or upon

(1) See the Editor's note to *Pearson v. The Bank of England*, antea, 2 vol. 529. It has been long settled, by the present and subsequent cases, that the Bank ought not to concern itself with any trusts to be executed, where the executor, or other person claiming under a testator, has a legal right to call for a transfer of the funds; "for, otherwise, the Bank would be charged with all the trusts in the kingdom."

It has, however, so happened, that the Bank has often, on such occasions, exercised a rather arbitrary power; but the attempt has always failed; and it seems, that now, costs would be given against the Bank, on a renewal of it. See in *Hartga v. The Bank*, 3 Ves. 58; *Bank of England v. Parsons*, 5 Ves. 665, 669, where costs, both at law and equity, were given against the Bank; and the *Bank of England v. Lunn*, 15 Ves. 569, et seq.; upon the same principle. Vide *ibid.* the elaborate judgment of Lord Eldon, from p. 577. It is true, the Bank were, in 1803, successful in a strenuous endeavor for their costs in a previous case to the one last mentioned, viz. in *Austin v. The Bank*, 8 Ves. 522; but the law seems so completely settled by *Lunn's* case, before Lord Eldon, six years afterwards (15 Ves. 569, et seq.), that there would seem to be no force in any decision upon the most established principle, if the corporation were not made to pay costs in any case of a like resistance in future.

new or other securities, as to them (the trustees) should seem meet, and upon further trust, to pay unto, or permit the testator's wife, Elizabeth Moffat, and her assigns, during her natural life, to take the dividends, &c. for her use, with a proportionable part of the interest, from the last day of payment, to the day of her death, and from and after her decease," then in trust for other of the defendants, who are infants, to be paid to the males at twenty-one, and to the females at twenty-one or marriage, with benefit of survivorship, and made his trustees executors of the will.

The testator died in the course of the year 1790, leaving the defendant his wife, and two brothers (who are defendants) next of kin; and the executors proved the will.

There were standing in his name, at the Bank, 52,990*l.* 3 per cent. consolidated annuities, 22,825*l.* 4 per cent. annuities, 13,832*l.* 5 per cent. annuities, and 2000*l.* Bank stock.

The probate of the will being deposited at the Bank, the plaintiffs [*261] caused so much thereof as related to the testator's interests *in the several stocks, to be entered in the proper offices (according to the acts of Parliament), and subjected the same to the uses of the will, by causing entries to be made in the respective transfer-books, in the words or to the effect following, viz. "to remain during the life of Elizabeth Moffat, and, at her decease, to go as the will directs."

The executors and trustees applied in November, 1790, to the Bank, and requested them to permit a sale or transfer of the stocks which stood in the testator's name, to such person as they should appoint, which the Bank refused, but were ready to permit a transfer into their own names, upon the trusts of the will, but which the executors would not accept, and brought an action against the Bank in the Court of King's Bench, and filed a declaration, laying their damages at 100,000*l.*

Upon this, the Bank filed the present bill, insisting upon its having been their custom, ever since the institution of the Bank, that where any share or interest in the funds, transferable at the Bank, is specifically bequeathed to one or more legatee or legatees, and no trustee or trustees are appointed, to permit the interest so bequeathed to be transferred to the legatee or legatees only, and to no other person or persons; and where any trustee or trustees are appointed, to suffer the interest to be transferred to the trustees only, but not to permit them to sell or transfer the same to any other person than the legatee or legatees, beneficially interested therein; and therefore prayed an injunction to restrain the defendants from proceeding at law.

The defendants, by their answer, admitted the facts in the bill, and the practice of the Bank; but insisted that, where no specific bequest is made of the stock, but the same is included in the devise or bequest of the general residue of the testator's estate, as in the present instance, the plaintiffs have no authority, nor have been used to restrain the executors from transferring to other persons than the legatees; and that, in such case, the plaintiffs are not bound to take notice of the trusts, but the defendants are alone answerable to the *cestui que trust*.

Upon the answer coming in, the defendants moved to dissolve [*262] the injunction; and the plaintiffs afterwards moved that the *injunction should be extended to restrain the defendants from proceeding to trial at law.

Upon these motions, the question came on twice to be argued.

Mr. *Solicitor-General*, Mr. *Mansfield*, and Mr. *Wooddeson*, for the plaintiffs, contended in support of the propriety and legality of their prac-

tice, and that it extended to the case of a residue, as well as of a specific legacy, wherever that residue was specifically given. That the practice was grounded on the construction of the statute 5 William and Mary, c. 20, by which the Bank was instituted, and the other acts of Parliament [1 Geo. 1, stat. 2, ch. 19, sections 9, 11, and 12, &c. As to which see 15 Ves. 577, et seq.], which regulate the devise of this kind of property, and by which the probate of wills are to be deposited with them, for the purpose of extracting the trusts; and why to extract the trusts, unless they are afterwards to take notice of them? Where there are no trustees appointed, the Bank are trustees. Where trustees are appointed, still they must enter the whole will; and must, consequently, see to the disposition of the property as co-trustees, or as a check upon the other trustees. They referred to Douglas, 525, *The King v. The Bank*, where the practice of the Bank was admitted. Though the Bank may not be liable in case of a misapplication, yet that is not laid down decisively; and, though it be so, the Bank have a right to the common privilege of trustees, to have the trusts administered by this Court, which is the proper and peculiar characteristic of its jurisdiction.

Mr. *Mitford*, and Mr. *Stanley*, for the defendants, argued, that how proper soever the practice of the Bank might be in the case of a specific legacy of stock, it was not so in the case of a residue; and, in this case, it was a simple residue of a personal estate, which must necessarily vest in the executor for payment of debts, and other necessary purposes. In the case even of specific legacies, and of terms of years, they do not vest in the legatees till after the assent of the executor, who may want them for the payment of debts: till after the assent of the executor the legatees of a bond cannot discharge it. (2) This is like any other specific legacy, and the defendants, therefore, are entitled to call upon the Bank for a transfer. (2)

Lord Chancellor (3) acceded to this idea of the residue, in the present case, being like a specific legacy, and requiring the assent *of [*263] the executor; that the act of Parliament giving a power to devise, and treating it as personal property, it must be subject to all the incidents of a gift of personal property; and, therefore, that the Bank must permit a transfer of the stock; and dissolved the injunction.

(2) Mr. Brown utterly misconceived this part of Lord Redesdale's argument. His Lordship has favored the Editor with his own note of it, which, after considering the passage between the above figures as expanded, proceeds as follows:—

“Even if this could be deemed a specific legacy, it would be like any other specific legacy, which would require the assent of the executor; but this is not a specific legacy, and, therefore, even according to the rules adopted by the Bank, the defendants are entitled to call upon the Bank for a transfer. It was added, that in any manner to reduce this to a specific legacy, being expressly given after debts and legacies paid, the assent of the executor was necessary, to acknowledge that they were paid; and that, until that acknowledgment was made, the Bank could not see to the right transfer of the stock, because the creditors and pecuniary legatees were, by the terms of the will, as much specific legatees of the stock as the residuary legatees.”

(3) The following account of Lord Thurlow's decision appears, from the notes of Lord Eldon C. in 5 Ves. 668, n. “The Chancellor thought the operation of the acts was to enable the proprietor of stocks to make specific bequests of them, notwithstanding the previous negative words in the act, and therefore the assent of the executors is necessary to the validity of the bequest, in the same manner as their assent would be necessary to the validity of the bequest of a leasehold estate, bond debts, &c.; and therefore, until assent, the action of the executors remained, and he thought the injunction must be dissolved.

“Order pronounced accordingly, *de bene esse*, 10th of June, 1791. The order was delayed a great while; the Chancellor saying, he wished to consult Lord Kenyon.” Upon the above points of specific bequests, &c., vide the Editor's notes to Pearson v. The Bank of England, ante, 1 vol. 529, and the reference in note (1), ante, p. 260; more especially, 15 Ves. 681.

SIMMONDS v. The Countess DU BARRE.

Lincoln's-Inn-Hall, 10th June.

Foreigner's answer. (1) Order as to an affidavit by a person unacquainted with the English language.

WHERE a foreigner puts in answer in his own language, a sworn translation must also be filed with it. (a)

(1) Vide etiam Lord Belmore v. Anderson, postea, 4 vol. 90. The Editor subjoins the following order pronounced by Lord Hardwicke C., as to an affidavit by a person unacquainted with the English language:—

Lord Hardwicke. (*Roach v. Garvan*, Reg. Lib. 1748, B. fol. 4, 5. 10th Nov. 1748.)—"The petitioner having received her education in France, and being as yet not well acquainted with the English language, it was therefore prayed, and it is accordingly ordered, that the affidavit of the said petitioner E. R. be taken and sworn in the French language; and that Abraham Ogier, of London, notary public, be appointed to translate the same into the English language; and that the said Abraham Ogier be sworn to the true translation thereof; and that such translation be annexed to, and filed with, the said affidavit, in order to be made use of and read in these causes; but notice hereof is first to be given to the other parties, &c."

(a) 1 Barbour, Ch. Pr. B. 1, ch. 6, § 5, p. 154, 155; *Hayes v. Lequin*, 1 Hogan, 274; *Smith*, Ch. Pr. (Am. edit.) 265; 1 Hoff. Ch. Pr. ch. 8, Sec. 3, § 12, p. 236.

LAKE v. CAUSFIELD. [13th July.] Lincoln's-Inn-Hall, 21st June.

(Reg. Lib. 1790. B. fol. 418. b.)

Order on the register of an ecclesiastical court to deliver an original will to be produced here on security given to return it. (1)

MR. LLOYD moved, that the register for the bishoprick of Durham, might deliver to the plaintiff the original will of ——— Proctor, in order to its being produced here, he giving security to restore it; he cited 1 Atk. 627, and *Williams v. Floyer*, Ambl. 343, which refers to several cases in which the same order has been made.

(1) This is, certainly, the practice now, though it seems open to much objection; and Judges have, at different times, expressed their surprise at its assumption. Vide *Morse v. Roach*, 2 Strange, 961, and 1 Dick. 65; *Peirce v. Watkins*, 2 Dick. 485; *Forder v. Wade*, postea, 4 vol. 476; *Hodson v. Anon.* 6 Ves. 135; *Ford v. Anon.* ibid. 802; et per Lord Eldon C., in *Fauquier v. Tyte*, 7 Ves. 292, where his Lordship refused to follow the analogy, by ordering depositions in the French language to be delivered out for translation. It is observable, that Lord Eldon C. seemed at a loss for the foundation of the jurisdiction of the Court of Chancery, with regard to these orders as to wills. Perhaps the best account of the subject may be found in Sir John Strange's report of *Morse v. Roach*, above referred to. (2 vol. 961.) It is as follows:—"Before the year 1718, the method was to deliver out a will of land to be proved at trials, or on commissions, upon security. Since that, the registers have refused to deliver out the will, but insist upon being paid for attending with it; and where it was wanted at a distance, their demands ran very high. In this cause an order was made (upon producing three precedents), that it should be delivered out on security, it being a bill brought by creditors and legatees, who were not likely to suppress it."

*TRINITY TERM.

[*264]

31 Geo. 3. 1791.

WILLIAMS v. LAMBE.

(Reg. Lib. 1790. B. fol. 653. b.)

Plea of purchase for valuable consideration, not good to a bill for a dower. (1)

THIS was a bill for dower, stating that the plaintiff was lawfully married to William Williams, and continued his wife to the time of his death. That William Williams being seised of lands, &c. situated in Delwyn, in the county of Hertford, during the coverture, in February, 1783, sold the same to the defendant, who entered into possession of the same, and that William Williams died in May, 1786, leaving the plaintiff his widow. The bill, therefore, prayed a discovery of the lands, and that defendant might assign to her one third part, as her dower.

The defendant pleaded to the discovery and relief, that he was a purchaser of the estate (subject to a mortgage) for valuable consideration, without notice of the vendor being married.

Mr. *Solicitor-General*, and Mr. *Richards*, argued, that this plea, being to the relief, as well as the discovery, was bad; that it admits that the defendant has the deeds in his possession, without which the plaintiff could not proceed at law, and the outstanding term which may be set up at law. That the plea is overruled by the answer, which gives the discovery which the plea sets up as a bar.

Mr. *Mansfield*, in support of the plea, argued, that whether the defendant purchased the estate subject to the mortgage, or not, was immaterial to the present case; the plaintiff has a legal title, that she prays a discovery, and to have dower assigned; to this, the defendant pleads that he is a purchaser for a valuable *consideration, without notice; [*265] and if so, he is within the protection of the Court, which will

(1) Notwithstanding what is said to the contrary, in *Bassett v. Nosworthy*, Finch, 103, approved, as it seems to be, by Lord Loughborough C., 2 Ves. jun. 457, 458, and notwithstanding what is said by Mr. Sugden, at the conclusion of his work on Vendors and Purchasers, pp. 667, 668 (5th edit.), so much respect is due to Lord Thurlow's judgment in marking the distinction within stated, that the Editor questions, whether the point has been sufficiently considered. The Editor, in particular, much questions, whether Lord Loughborough was aware of the present determination, when he threw out the general propositions above adverted to in this note (2 Ves. jun. 458). Mr. Beames, who is eminently versed in the doctrine of Pleas, both at law, and in equity, distinctly treats Lord Thurlow's decision here as unimpeachable, notwithstanding he had, a few pages before, quoted the dicta to the contrary, in *Bassett v. Nosworthy* (vide Elem. Pl. 245, 234); and it is very satisfactory to the Editor to find his own sentiments corroborated by the observations of Mr. Roper, contained in his modern treatise on the Law of Baron and Feme, 1 vol. 446, 447. That gentleman, speaking of the principal case, says, "This decision, though quarrelled with, is, as it would seem, sound and proper; for when it is admitted that dower is a mere legal right, and that a court of equity, in assuming a concurrent jurisdiction with courts of law, professedly acts upon the legal right, that court, in analogy to law, where such a plea would not be looked at, decides, that in this instance, the same equitable plea is also inadmissible. This analogy, it is obvious, does not hold where the widow applies for equitable relief, as the removal of terms, &c. In such cases, the equitable plea of being a purchaser for value without notice cannot, as it would seem, be resisted. In the first case, the widow, proceeding upon the concurrent jurisdiction of the Court, merely enforces a right, which the defendant cannot at law resist by such a mode of defence; in the second case, she applies to the equity of the Court to take away from him a defence, which at law would protect him against her demand." The Editor has also to observe, that Lord Redesdale, in the last edition (3d) of his Treatise (p. 38), does not question the decision in the principal case; with regard to which the Profession should also be referred to 1 Ball & Beatt. 171.

Upon an appeal to Lord Chancellor. *Mr. Solicitor-General*, and *Mr. Lloyd*, in support of the decree, insisted it was necessary to state specific errors; for that, otherwise, the defendant must be prepared to prove every item in his account; as it would be impossible for him to know what the plaintiff would impeach, and cited *Dawson v. Dawson*, 1 Atkyns, 1.

[*267] **Mr. Mitford* insisted, if an action had been brought by the defendant, the plaintiffs might have shown an error, notwithstanding the reservation of "errors excepted."

LORD CHANCELLOR said, the expression "errors excepted," did not prevent its being a settled account; and the balance being carried over showed it was so; and, therefore, the errors should have been pointed out: (a) and affirmed the decree.†

† See *Taylor v. Haylin*, *antea*, vol. ii. p. 310, S. P.

(a) See *Calvit v. Markham*, 3 How. 343; *Mebane v. Mebane*, 1 Ired. Eq. 403; *De Montmorency v. Devereux*, 1 Dru. & Walsh. 119; *Leaycraft v. Dempsey*, 15 Wend. 83; *Baker v. Biddle*, 1 Bald. 394, 418; *Eden on Injunct.* (2d Am. edit.) 18, and note (b); *Bainbridge v. Wilcocks*, 1 Bald. 536, 540; *Consequa v. Fanning*, 3 John. Ch. 587; S. C. 15 John. 511; 1 Madd. Ch. Pr. (4th Am. edit.) 103; *Taylor v. Haylin*, 2 Bro. C. C. 310, and notes. As to the practice on accounting, see 1 Barbour, Ch. Pr. B. 2, ch. 3, § 3, p. 505, et seq.; 1 Hoff. Ch. Pr. 522, et seq.; Hoff., Master in Chancery, ch. 2, § 9, p. 75, et seq.

CONWAY v. CONWAY. [4th July.]

(Reg. Lib. 1790. A. fol. 564.)

Portions charged on a reversionary fund shall not, in general, be raised till the term comes into possession (1); yet when it is expressly directed, under a power, that they shall be raised as soon as may be, they shall bear interest from the death of testator. (1)

By settlement made 23d August, 1744, upon the marriage of John Conway with Margaret his wife, certain lands in the county of Anglesea were conveyed to trustees, to the use of John Conway and Margaret his wife, and the survivor of them for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to trustees for a term of 200 years; remainder to the first son of the marriage; with divers remainders over. And the trusts of the term were declared to be, that the trustees, or the survivor, or the executors of such survivor, might, out of rents and profits, or by demise, or sale thereof,

(1) Lord Eldon C. observed this report was very wrong; and in *Codrington v. Lord Foley*, 6 Ves. 378, et seq., deduces and lays down the true rule in these cases thus:—"Upon the authority of Lord Talbot, Lord Macclesfield, and Lord Hardwicke, namely; that, in each case, the question depending upon the particular penning of the trust, and a fair construction of the whole instrument, the general principle is, that, if there be nothing more than a limitation to the parent for life, with a term to raise portions at twenty-one, or marriage, and the interests are vested, and the contingencies have happened at which the portions are to be paid, then the interest is payable, and the portions must be raised in the only manner in which they can be raised; that is, by mortgage or sale of the reversionary term." Lord Eldon, however, in the same case, disapproved of what Lord Hardwicke and other Judges had stated, of the Court being anxious "to lay hold of small grounds to take cases out of that rule; observing, they are not small grounds, if sufficient to denote an intention; and, if not sufficient, the Court would be guilty of a dereliction of its duty to be weighed by them." *Ibid.* p. 380. See also per Lord Eldon C., in *Hope v. Lord Clifden*, 6 Ves. 499, 509. & And Lord Northington's observations in *Cholmondeley v. Meyrick*, 1 Eden, 85. Lord Alvanley, also, in the case of *Lady Clinton v. Lord R. Seymour*, 4 Ves. 460; *Verney v. Earl Verney*, 2 Eden, 26; *Fonbl. Eq. B. 2*, ch. 8, § 6, and note (e). *Mr. Vesey's note to Earl of Albemarle v. Rogers*, 2 Ves. 481; *Butler v. Duncombe*, 1 P. Wms. 453; *Lyddon v. Lyddon*, 14 Ves. 566. }

raise a 'sum of 1000*l.* for the portion of any daughter or daughters, younger son or sons of the marriage, as should, by virtue of the limitations aforesaid, not be immediately inheritable to the said premises, or any part thereof, to be paid to such daughter, &c. (not immediately inheritable as aforesaid), at such time or times, and in such manner and proportions, as the said John Conway, by any deed, &c. or last will, attested as therein mentioned, *should direct or appoint; and in default of such appointment, then the sum of 1000*l.* to be paid, within six calendar months next after the decease of the survivor of them, the said John Conway, and Margaret his wife, to and among such daughters, &c., share and share alike.

John Conway died in 1766, in the lifetime of his wife, having made his will, pursuant to the power, whereby, after several other devises, he devised as follows: "lastly, as to the *power of charge I have [*268] to dispose of upon my estate by marriage settlement, and also the 1200*l.* upon my said purchased estates, devised to trustees as aforesaid; all these sums, being 1000*l.* by settlement, and 1200*l.* upon my purchased estates, I devise, and wish my said trustees, as soon as it can conveniently be done, will divide among all my younger children, share and share alike (I mean by such, all of them that do not inherit my real estate, or have a right so to do), upon the decease of my wife."

John Conway, at the time of his death, left Margaret his widow, John Maurice Conway his eldest son, and heir-at-law; the plaintiffs, Robert, Catharine, Margaret, and Jane; also Mary Conway, Susannah Conway, and Harriet Conway, his younger children, by the said Margaret, his wife.

Mary Conway, in the lifetime of her mother, intermarried with Thomas Edwards, one of the defendants, and died also in the lifetime of the mother; Susannah intermarried with John Lloyd, and they are defendants.

Harriet Conway died in the year 1784, in the lifetime of her mother; having, when of age, made her will, and her mother executrix thereof.

Robert Conway had attained his age of twenty-one years, and assigned his share of the 1000*l.* to his mother.

Margaret, the widow, died December, 1786, having made her will, and appointed her daughters, the plaintiffs, executrices, who were also the representatives of Harriet Conway.

Plaintiff's bill charged, that their portions were vested interests, at the time of the decease of their father, John Conway, and that they are entitled to interest for the same from the time of his death; that Harriet Conway, and Mary Edwards, who died in the lifetime of Margaret Conway (surviving her husband), took transmissible interests, and the plaintiffs prayed that it might be declared accordingly.

An objection was taken at the hearing by Mr. *Lloyd*, that the trustees of the charge of 1200*l.* upon the purchased estate, who *were [*269] to make the division of the 1000*l.*, were not before the Court, although the trustees of the term were.

But Mr. *Mansfield* insisted, that they were not necessary parties, being wholly uninterested, and that the testator had not appointed to them.

Lord CHANCELLOR said, if he was obliged to take any notice of the 1200*l.* he could not go on without them, and the personal representative; but, though the will had words referable to them, their concurrence was not necessary.

Mr. *Mansfield*, for the plaintiffs.

The plaintiffs claim, under the will, their shares of the 1000*l.*, with interest from the death of their father, John Conway. Their right depends on the words of the will, in which the testator has used words that manifestly indicate his intention, that the division should be made as soon as possible, which could not mean that it should be postponed to the death of the wife. The words must bear their natural sense, and there is nothing in the subsequent words to contradict it.

Mr. *Lloyd*, and Mr. *Abbot*, for the defendants.

This is a case of great consequence, in point of principle, though the value in the present instance is but small. This was a settlement of the wife's estate, of which she was seised in fee, upon the husband for life; remainder to the wife for life; remainder to the first son of the marriage, who had no provision during the life of the mother; and the children, at the death of the father, were very young. It has always been the course of the Court, not to raise portions for children where they have died young, even if the portions were to be paid at twenty-one, or marriage. It could not be the intention of the testator that the portion should be raised for a child of three or four years old, and that he might file a bill to have the sum raised, though he might afterwards die in the lifetime of the wife. No case of this sort has come before the Court, because in these cases the portions are generally raisable at twenty-one, or marriage; but, cer-

[*270] tainly, here the children were intended to be in the parent's power. The Court is very averse to raising portions upon reversionary terms, because it would be the destruction of family estates; and, therefore, in *Stevens v. Dethick*, 3 Atk. 39, Lord Hardwicke refused to raise it in the lifetime of the surviving parent. Here the death of the wife was, manifestly, in contemplation. The words, "I mean by such, all of them who shall not inherit," render the whole contingent, as it would be impossible to ascertain, till the death of the wife, who would be the younger children. In the mean time, the younger son might become the elder, and proprietor of the estate; and the Court would never raise it for him, whilst a younger son had the chance of getting it back from him, if he should become the eldest. And that argument applies to all the plaintiffs; as it was in contemplation, at the time of making the settlement, that no part of this 1000*l.* should go to the owner of the estate; and the testator could not mean that it should be raised during the life of the widow, who would take the whole profits for her life, and the son would have no provision. In *Reresby v. Newland*, 2 Wms. 93, Lord Macclesfield said, he would not go a jot further than had been gone before, and refused to raise a portion upon a reversionary term. In *Brown v. Berkeley*, Eq. Abr. 340, the same thing was determined. It is necessary there should be a very clear intention to do such an act of violence to the estate; and the intention here was, that it should not be paid till six months after her death; at least such confused words as these do not show any intent to raise it sooner than it conveniently might be, after the mother's death. The true construction is, that the 1000*l.* should be raised at the death of the wife, and then interest will only be payable from her death; and those children who died in her lifetime will not be entitled.

Mr. *Solicitor-General*, and Mr. *Alexander* (for the defendant in the same interest with the plaintiffs, being the representatives of Mary, who had married, and died), observed, that the construction contended for by Mr. *Lloyd*, would be just the same as if the testator had died intestate; in which case, the children would have taken their portions six months after the death of the wife; or, at most, would only make those six months'

difference, by vesting the portions at the death of the mother. In fact, the daughter who married, and died, stood in need of her portion. The description is merely the same as younger children; that *has [*271] never prevented the portions from vesting; the case of Lord *Teynham v. Webb*, 2 Vesey, 198, shows that the portion would have vested, though it might be liable to be divested.

Lord CHANCELLOR. (2) Where a man gives portions, charged on a term to arise upon the death of a party, it shows that they are not to be paid till after the death of that party, and that though it be upon attaining twenty-one, or marriage, yet that it can only be where the term shall come into existence. One would go as far as might be, upon the rule not to press estates; but still such an intention can never be raised against express declaration. (2) Here, the settlement foresaw that, during the life of the wife, the husband might die, and it might be necessary to make a provision for children, and it was intended to enable him, in his lifetime, or after his death, to advance the provision, and that it certainly was to arise after the death of the wife; when the original settlement foresaw this case, it is in vain for me to say, that it is contrary to the intention of the settlors that the estate shall be pressed. Then the question is, whether he meant to execute it short of the power; but I think it is clear he meant to execute his whole power: probably, had it been suggested to him, that, by executing it thus, the provision might, in events, be to be raised for other persons than his children, he might have used some words to control it. With respect to the value, the construction must be the same as if it was only one year's produce of the estate. It does appear he meant to execute his whole power; I should say this if the 1000*l.* only was in question; but it receives additional strength from the 1200*l.* being given in the same way: I allow this came from a different fund, but the frame of the gift applies to both, and the 1200*l.* was necessarily to be raised upon his death; this, therefore, must necessarily be raised.

Decreed for plaintiffs.

(2) Lord Eldon C. said, "that, upon looking at his own brief in this cause, and to other cases, he was satisfied Lord Thurlow never did express himself in the words [above] attributed to him; which appear to contradict all the authorities." His Lordship then again, referring to the authorities, states, "they in effect say, there must be some circumstance in the will, or settlement, denoting an intention to take any case out of the general rule; which is, that the portions shall be raised at the days or times limited, unless the will or settlement contain circumstances indicating an intention that they are not to be raised at those days or times." In *Codrington v. Lord Foley*, 6 Ves. 379, cited *antea*, note (1), *quod vide*. The Editor, having been favored with the note of Lord Thurlow's judgment, taken at the time by Lord Colchester, who was counsel in the cause, thinks it important to be subjoined:—

"Lord Chancellor. — Where a man gives portions to children, by a term created and 'emerged' on the death of the father or mother, it is a fair inference, that it was not the intention to raise the money before, as there is nothing by which it would appear to be the intent that it should be raised, but attaining the age of eighteen, or marriage. But then it might be, that the age of eighteen, or marriage, might happen before the death of father or mother, until which nothing can be raised. In looking over this instrument, it appears to me that the original settlement had in view what has happened, viz., that, during the life of one tenant for life, it might be essential to raise the portions for the younger children.

"The form of the power is only that, in defect of the testator's raising the money, it should be raised by the trustees on the death of the wife. When the original settlement foresaw this case, it is in vain to contend that it is hard the estate should be pressed in this manner. The words are such, that the testator showed his intent to do all in his power. Probably, if he had thought of the personal representative of his children, he might have used words to exclude them. This, I should have said, would have been the case, if the will had only extended to the 1000*l.*; but it receives additional strength from being coupled with the 1200*l.*, which must be admitted to have given an immediate interest; although I agree the sums arose out of different funds, and one was subject to a power, the other not; but that does not vary the intention as to time of payment."

[*272] *Lowson v. Lowson. [6th July.]

(Reg. Lib. 1790. B. fol. 544.)

(Upon exceptions to the Master's Report.)

Where testator refers to a power, but does not legally execute it, but has other estates, to which the will can apply, the defect of the execution cannot be supplied; though where he could not make the gift but by virtue of the power, he shall be supposed to have intended to execute it, and therefore the defect shall be supplied. (1)

FRANCIS LOWSON and Mary his wife were seised in fee of copyhold estates, held of the manors of Bondgate, in Darlington and Evenwood, in the county of Durham, and being so seised, surrendered the same to Edmund Lowson, brother of Francis, in trust, to the use of Francis for life, remainder to Mary for life, remainder to the heirs of their bodies, remainder to the right heirs of the survivor of them, with a power to Francis and Mary, by deed, to revoke and appoint new uses.

By indenture, dated 1st March, 1742, duly executed under the power, Francis and Mary revoked the old uses, and appointed the estates in trust for Francis, for life, remainder to Mary for life, provided she should so long continue his widow, and after the decease of the survivor, in trust, for such uses, &c., as Francis should, by his last will, or by any deed, &c., appoint, of and concerning the same, to and amongst the children of the said Francis Lowson, by the said Mary, his wife; and the estate was to be charged with an annuity of 20*l.* a year for Mary, if she should marry again; and there was a proviso, enabling Francis and Mary to vary the uses, by any subsequent deed; but no such deed ever was executed.

Francis Lowson was seised of other copyhold estates, held of the same manors, which were (according to the custom of the manors) surrendered to the trustees, to the use of his (Francis's) will. He also, after the deed, purchased other copyhold estates, which were surrendered in like manner, and was also, at the time of making his will, seised of freehold and of other copyhold estates.

Francis Lowson made his will, dated 14th September, 1763, duly executed to pass real estate, and agreeable to the deed of 1st March, 1742, and in pursuance of the power; and thereby reciting that he had surrendered his copyhold to trustees to the use of his will, he devised the same to his wife, Mary Lowson, and others, as trustees, in trust for [*273] the several uses therein contained, *subject, nevertheless, to the estate thereafter directed to his wife, of his messuage and malting, with their appurtenances then in his possession, situate in Bondgate, in Darlington aforesaid, also to her claim, forth, and out of her own estate, by virtue of the said settlement made thereof after marriage, in trust, that his trustees, or the survivors, &c. should by and out of the rents and profits of the premises, or by sale or mortgage, raise and pay to his sons (enumerating them) and to his grandson Wardale Lowson, 500*l.* each, as they should attain the age of twenty-one, with interest from his death; also to raise 300*l.* among his children, or his grandson Francis Perking, as his wife should appoint, then to permit his wife to take the rents for life, and after her decease, to pay an annuity to his eldest son Francis, and

(1) For the principle on these subjects, see the Editor's note and references to *Andrews v. Emmot*, ante, 2 vol. 297, especially *Nannock v. Horton*, 7 Ves. 391, &c.; *Bennet v. Aburrow*, 8 Ves. 609, &c.; *Jones and Tucker*, 2 Meriv. 533, &c.; *Jones v. Curry*, 1 Swanst. 56, &c.

subject thereto, to his second son Newby, for life, remainder to his first and other sons in tail male, with remainders over.

The bill was filed to establish this will, and for other purposes.

The defendant, Young Lawson, by his answer, insisted that this will was not a good execution of the power.

At the hearing, it was referred to the Master to take the several accounts, and among other things, to inquire as to the customs of the manors, and whether the will passed the estates comprised in the settlement. The Master had reported, that the will passed the estate in the settlement.

To this report exceptions were taken.

Mr. *Solicitor-General*, in support of the exception, contended, that the will was not intended to pass the copyhold comprised in the settlement, and which was the subject of the power. If the words of the will can be satisfied by other property, the Court will not presume the testator meant to execute his power. He has given the property to persons who are not the objects of the power, which is confined to children, whereas he has given the inheritance to his grandson, and has excluded one of his sons, Francis (to whom he has only given an annuity), who, according to the power could not be excluded.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Ray*, contended, in support of the Master's report, that the will intended to pass the estates, *which were the subject of the power. The testator, in the begin- [*274] ning of the will, refers to the power which could apply to no other estates; he makes his will in "pursuance of the power;" he could not have used the words "subject to the estates thereafter devised to his wife," had he meant any estates, but those which were the subject of the power. He certainly must have had these estates in contemplation, though he speaks of them as his own estates.

Lord CHANCELLOR said, that general words of gift will apply to a power, where the testator could not give the property otherwise than by virtue of the power, but words of gift do not, in general, apply to the execution of a power. In the beginning of this will, the testator means to dispose of his own estates, in opposition to his wife's, which he calls her own estates, which contrasts the two. If he meant this as an execution of his power, he must have supposed the power extended to a disposition to grandchildren. If this was to be held an execution of the power, it would be beyond any of the cases. (a)

Exception allowed. (2)

(2) Not so. But an issue was directed, as to whether the estates "in question passed by the will of the testator, according to the custom of the manor whereof the same were holden. — R. L."

(a) See Sugden on Powers (4th Lond. edit.), 287, et seq.; *Andrews v. Emmot*, 2 Bro. C. C. 297, 301, n. (a), 303, n. (a), and cases cited; 4 Kent (6th edit.), p. 335; *Bradish v. Gibbs*, 3 John. Ch. 561.

FREKE v. Lord BARRINGTON and Others. Rolls, 11th July. (2)

(No Entry.)

[Conditional limitation. Election. Devise of Whiteacre to A. for life, upon condition that A. suffer a recovery of Blackacre, and settle it; and if he does not, then, after the decease of A. Whiteacre to go to B. A. took Whiteacre, but did not settle Blackacre. The heir of A. is not bound to convey pursuant to the condition, nor are A.'s assets liable to make good the breach of the condition; for it is a conditional limitation, and not a case of bare condition, or of election.] (1)

By indenture *quinguepartite*, dated 6th March, 1712, and made between Thomas Freke and Elizabeth his wife, William Freke, brother of the said Thomas Freke, and Rauffe Freke, son and heir-apparent of said William Freke, of the first part; Maynard Colchester and Ann his [*275] wife, of the second part; John Freke* and Bartholomew Beale, of the third part; Sir Thomas Clark and Thomas Harris, of the fourth part; and Henry Southby and Henry Colchester, of the fifth part; made previous to the marriage of Rauffe Freke and Ann Colchester; Thomas Freke and Elizabeth his wife, William Freke, and Rauffe Freke, released to the trustees of the third part, the manor of Hannington, to the uses thereafter mentioned; and covenanted to levy a fine, in order to make the said trustees tenants to the *præcipe*, for suffering a recovery, to enure to the following uses; as to a messuage called Batsons, &c. To hold to the use of the said Rauffe Freke for life, *sans* waste; remainder to Ann Colchester for life, for her jointure, in lieu of dower; remainder to the trustees, to preserve contingent remainders; remainder to the trustees of the fourth part, for 500 years; remainder to the trustees of the fifth part, for 1000 years; remainder to the first and other sons of Rauffe Freke, in tail male; with remainder to Thomas Freke, in tail male; and as to the said manor, and other the lands, &c., whereof no use was before declared, to secure 300*l.* a year to the said Elizabeth, wife of Thomas Freke, for life, and, subject thereto, to said Thomas Freke in tail, remainder to William Freke, in tail, remainder to Rauffe Freke for life, *sans* waste; remainder to trustees to preserve, &c., remainder to his first and other sons in tail male: and as to all the premises after the several uses before declared, to William Freke, in tail general, remainder to the right heirs of Rauffe Freke; and the trusts of the 500 years' term were to raise portions for the younger children of the marriage, to raise 2000*l.* if but one such younger child, and 3000*l.* if two or more, equally to be divided: and the trusts of the 1000 years' term were for purposes which never took effect.

The fine and recovery were levied, and suffered, and in 1721 Thomas Freke died without issue; whereby William Freke became tenant in tail in possession, of the manor, &c., of Hannington.

By lease and release, dated 17th and 18th October, 1722, between William Freke, of the first part; Thomas Harris and John Higham, of the second part; Henry Freke and John Hipposly, of the third part; William Freke conveyed the manor of Hannington (except Batsons) to make them tenants to the *præcipe* in a common recovery, to enure to the use of said William Freke for life, *sans* waste; remainder to [*276] trustees, for 500 years, and subject thereto to the *use of Rauffe

(1) The above marginal abstract is from the MS. report of the case, by Sir John Simeon, and is substituted for that of Mr. Brown, as more pointed and comprehensive.

(2) Vide *Lewis v. Freke*, 2 Ves. jun. 507, 511, 512, 513, and the notes, *postea*.

Freke for life, *sans* waste; remainder to trustees to preserve, &c., remainder to William Freke, son of the said Rauffe Freke, and grandson of said William Freke, for life; remainder to trustees, to preserve, &c.; remainder to first and other sons of William Freke, the grandson, in tail male; remainder to the second and other sons of Rauffe Freke, in tail male; remainder to Thomas, another son of William Freke, party thereto, in tail male; remainder to John, another son of William Freke, party thereto, for life, *sans* waste (who was the father of the plaintiff); remainder to trustees, to preserve, &c.; remainder to his first and other sons in tail male; with like remainders to Robert Freke, another son of William Freke, for life, and his first and other sons in tail male; remainder to the right heirs of Rauffe Freke: and the trusts of the 500 years' term was declared to be, that the trustees, or the survivor of them, or the executors, &c., of such survivor, should raise and pay any sum not exceeding 2000*l.* for the benefit of the younger children of the said William Freke, or for such purposes, as he should, by deed, appoint: and on further trusts, to raise and pay any sum, not exceeding 3000*l.* for the daughters and younger children of said Rauffe Freke, son of said William, in such proportions, manner, and form, as the said Rauffe Freke, by deed or will, executed in presence of three witnesses, should appoint; and for want of such direction, only 2000*l.* should be raised out of the term for said younger children, equally to be divided between them: And the term was declared to be on further trust, to raise a sum, not exceeding 4000*l.* for the daughters and younger sons of William Freke, the grandson, in such proportions, manner and form, after the death of William Freke, party thereto, and Rauffe Freke, either in the lifetime, or after the death of said William Freke, the grandson, as he should, by deed or will, executed and attested by three witnesses, direct or appoint; and for want of such direction or appointment, then only 3000*l.* should be raised, equally between them. In which said indenture of release, is a proviso, "that in case said William Freke, the grandson of said William Freke (or his elder or only son, in case of his death), or such other son of Rauffe Freke, son of said William Freke, in case of the death of William Freke the grandson, and all the issue male of his body, or, in case of his death without issue male, the person who shall, for the time being, be the elder or only son of Rauffe Freke, son of said William Freke, and who shall live and come first to, *and attain twenty-one years, and be [*277] entitled to the possession and freehold, or a greater estate, of and in the said manor, &c., so released and confirmed by virtue of the limitations thereinbefore contained, should, within seven years after attaining that age, in case said Rauffe Freke and Ann his wife should both of them die within that time, otherwise, as soon as legally and effectually could be done, after the death of the said Rauffe Freke, son of said William Freke and Ann his wife, and the death of the survivor, by good, valid, and effectual conveyances and assurances, to the good liking of the said Thomas Freke, son of William Freke, or such other son or sons, or grandsons of said William Freke, or such other person or persons, to whom said manor, &c., thereby intended to be released, immediately before the execution of said indenture, stood limited, and would have descended, in case said Rauffe Freke, son of said William and Ann, were both dead without issue; well and sufficiently convey and assure all said excepted premises, so limited in jointure to said Ann for her life, as aforesaid (viz. the estate called Batsons, &c.), to such and the same uses, or as near thereto as might be, as the said manor, &c., stood thereby

limited unto, subsequent to, and in remainder after the estate hereinbefore limited to said Rauffe Freke, son of said William Freke, the grandfather, for the life of said Rauffe Freke, and should at the same time deliver one or more parts of such conveyances to said Thomas Freke, son of said William, or such other younger son, or grandson, of said William Freke, or such other person to whom said manor, &c., immediately before the execution of these presents, stood limited, and would have descended in case said Rauffe Freke, son of said William and Ann Freke, were both dead without issue; then it should be lawful for the said William Freke, the grandson, &c., after making and creating such conveyances of the said excepted premises as aforesaid, to limit any part of the premises by way of jointure for any woman he should marry, not exceeding 100*l.* for every 1000*l.* he should receive for a portion. Provided, also, that in case the said William Freke, the grandson of said William Freke, or his elder or only son (in case of his death), or such other son of said William Freke, in case of the death of said William, the grandson, and all his issue male, and in case of his death without issue male, who should, for the time being be elder or only son of said Rauffe Freke, and who should come first to, [*278] and attain twenty-one years, and be entitled to the possession *and freehold, or a greater estate, of and in the said manor, &c., by virtue of the limitations therein contained, should, for seven years after he or they, or such of them, as should live to twenty-one and be entitled as aforesaid, should refuse or neglect, by good conveyances, to the approbation of said Thomas Freke, son of said William, or such other son or sons, or grandsons, of said William Freke, or such other person to whom said manor, &c. stood limited, and would have descended in case Rauffe Freke, son of said William and Ann were both dead without issue male, to settle and convey all said thereinbefore excepted premises, so limited in jointure to said Anne for her life, to such and the same uses, or as near thereto as might be, as said manor, &c. thereinbefore mentioned to be thereby released, were and stood limited unto, subsequent, and in remainder after the estates thereby limited, to said Rauffe Freke, for the life of the said Rauffe Freke, and to deliver one or more part or parts of such conveyances to said Thomas Freke, son of said William, as to such other younger son or sons, or grandsons of said William Freke; or to such other person to whom said manor, &c., immediately before the execution thereof, stood limited, and would have descended, in case said Rauffe Freke and Ann his wife were both dead without issue male; or in case said William Freke, the grandson, should make a jointure to any wife out of said manor, &c., or any part thereof, for more than 100*l.* per annum, for every 1000*l.* he should receive as a marriage portion, or should not apply and pay such portion or portions, in discharge of the moneys to be by the said William Freke, or the said Rauffe, his son, directed to be raised by virtue thereof, by and out of the said term of 500 years, or so much of the said marriage portion as would be sufficient to discharge the same; then and from thenceforth all and every, the uses, estates, limitations, and appointments, therein and thereby before limited or appointed, of said manor, &c., which were and was subsequent to, and in remainder after, the estate therein before limited, to the use of said William Freke, the grandson, for his life, should cease and determine; and in such case, said manor, &c., should immediately after the death of William Freke, the grandson, and determination of the estates and uses thereby limited and appointed, which were precedent thereto, remain and be limited to the use of such person or persons, and for such estates, &c.,

as the said manor, &c., immediately before the execution thereof, stood limited, and would have descended *in case the said Rauffe [*279] Freke and Ann his wife, were both dead, without issue male."

There was also a proviso, that William Freke might, at all times during his life, make any leases of such of the premises as were or had been leased for lives, to all, every, or any of the daughters or younger sons of the said William Freke, the grandson, or any person or persons he should think fit, for three lives, or for any number of years determinable upon three lives, with or without impeachment of waste, so as the usual and accustomed rent should be reserved. It was also made lawful to the persons who should be in possession to make leases of the copyhold.

By virtue of this indenture, William Freke entered and enjoyed the manor of Hannington, for life; and Rauffe Freke, during the life of his father, held and enjoyed Batsons House, mentioned in the indenture of 1712, and excepted in the indenture of 1722, and, upon the death of his father, also entered upon and enjoyed the manor of Hannington, till his death. Ann, wife of Rauffe Freke, died in his lifetime, and he died about 1757, intestate, leaving William, his only son, and four daughters.

William Freke, the grandson, entered, and took possession of Batsons, in the indenture of 1712 mentioned, and excepted in that of 1722, and also, by virtue of the said deed, entered upon the said manor of Hannington, and enjoyed the same till his death, in 1782, but did not comply with the terms in these deeds, of settling Batsons to the uses in that deed, but suffered a recovery of Batsons, and declared the use thereof to be to himself in fee.

William Freke, the grandson, by deed of appointment, dated 19th February, 1782, charged the term of 500 years, with payment of 4000*l.* interest at 5 per cent. to his two daughters, Mary and Fanny, at their ages of twenty-one or marriage, with benefit of survivorship.

William died in November, 1782, without legitimate issue male, leaving said Mary and Fanny, and an illegitimate son, Knightly Freke.

Thomas, second son of William Freke, the grandson, died in January, 1768, without issue; and John, the next son of said *Wil- [*280] liam, died in September, 1761, leaving plaintiff his only son; and, by death of Rauffe Freke without issue male, plaintiff became tenant in possession, of the manor of Hannington, and is now in possession thereof.

William Freke, the grandson, made his will, and after charging his real and personal estate with payment of his debts, devised the lands in Hannington, which were settled upon his late mother, as a jointure (and which plaintiffs charged to be Batsons), to Lord Barrington and others, for 500 years, in trust, by sale or mortgage, to raise 1000*l.* for each of his daughters at twenty-one, with maintenance in the mean time; he gave the residue of the rents of the estate to his wife during widowhood, and if she married again, only one third for life, and after the determination of the term, he gave the premises to his son, Knightly Freke, for life, with remainder to trustees, and remainder to his first and other sons.

While William Freke, the grandson, was in possession of the estate of Hannington, he granted several leases to William Cole, for the lives of Knightly Freke, Mary and Fanny Freke, at low rents and nominal fines, in trust for his said children.

The plaintiff, as next tenant in tail, filed the present bill, claiming Batsons in specie, and demanding to have Batsons conveyed to the use of the deed of 1722 (upon the principle of election), or to have the lease

declared void, and the execution of the powers bad, or to have a compensation to the amount, in value, of the charges and the leases made upon Hannington estate.

Mr. *Lloyd*, and Mr. *Cox*, for the plaintiff, insisted that this was a case of election; that the deed of 1722 imposed a condition upon William, the grandson, to settle Batsons for the purpose of uniting that estate with Hannington, limiting both in the male line, with remainder over to the plaintiff.

That William had taken the whole on that condition, and by taking it had acquiesced therein, and had bound himself to perform it; that not having performed it himself, the defendants, as volunteers, are bound to perform it now; and should, therefore, convey Batsons to the [*281] plaintiff, according to the limitations *of the deed of 1722, or *cy pres*; that William the grandson had in fact elected to take, appeared clearly from the execution of the appointment of 1782, reciting the power given by the deed of 1722, and that he could not elect to take the benefit, without taking the burden. But that, if there was any doubt, whether he knew that he was bound, or that he meant to bind himself by accepting the benefit, to convey Batsons, though this might relieve Batsons from any specific lien, yet that the charges made upon the Hannington estate ought to be transferred to Batsons, or that compensation ought to be made out of the assets real or personal, of William the grandson, to the plaintiff, for the charges thrown upon Hannington, by the leases and portions, contrary to the intention of William the grandfather, and contrary to the equity of the case. They cited *Streatfield v. Streatfield*, Forr. 176; *Earl of Northumberland v. Earl of Aylesford*, Amb. 540; (a) *Frank v. Standish* (ante, vol. i. p. 588. n.); *Starkey v. Starkey*, 10th June, 1777, before Lord Bathurst. Lord *Beaulieu v. Lord Cardigan*, 6 Brown's Par. Cases, 232, which they said was disapproved by Lord Thurlow. (b)

That if it was to be considered as a case of condition, and not of election, that the intention of the deed was that the charges should not take place; for that though they were charged upon a term which was created prior to William's estate for life, yet not being raisable till after the death of William the grandson, the charge must be considered as an use subsequent to the life estate.

Mr. *Mitford*, Mr. *Graham*, Mr. *Simeon*, and Mr. *King*, for the defendants, insisted that this was a plain conditional limitation of Hannington estate, to William the grandson, and his issue male, upon condition of William suffering a recovery of and settling Batsons within seven years; but, on non-performance of that condition, William was to have no power of jointuring, and the estate was to go, after the death of William, to the plaintiff, or such person as would have been entitled in case William had been dead, without issue male.

That it could not be a question of election, because in all cases of that kind, though a condition was expressed or implied, no forfeiture [*282] or alternative is expressed; on which ground it is, that *the party electing, or some one claiming under him, must do the thing, or make recompense for not doing it.

But in cases of condition, the penalty on non-performance of the con-

(a) 1 Eden, 489, nom.; *Earl of Northumberland v. Marquis of Granby*. — *Eden*.

(b) As to this, see *Eden's* note to the above case of *Earl of Northumberland v. Marquis of Granby*, and *Buttrick v. Broadhurst*, ante, 88, acc.; *Wake v. Wake*, 1 Ves. jun. 335.

dition is specified, and in cases of conditional limitation, the estate given upon the condition is limited over on non-performance.

That all the cases cited, except that of Lord *Beaulieu v. Lord Cardigan*, were clear cases of election, and that case was a clear conditional limitation, the estate being limited over upon default of the devisee's settling the estate within a limited time, which was never done. For which reason the House of Lords reversed Lord Northington's decree: and that in *Butricke v. Broadhurst* (ante, p. 88), it did not appear that Lord Thurlow had disapproved of the decision in the House of Lords.

That the leases were all made pursuant to the powers; and if not, they ought to bring ejectments, and try the question at law.

That the charge of the 4000*l.* was made by deed, in the lifetime of William the grandson, though not raisable till after his death, and that if William had had a son, tenant in tail, and they had suffered a recovery, it would have let in the charge as prior to the life-estate of William; that this was not only the letter, but the spirit, of the deed; for the objects of the deed of 1722 were twofold and distinct, the one to provide for the younger children of Rauffe and William the grandson, at all events, the other to unite the two estates in the male line; the latter to be enforced by taking away the contingent power of jointuring, and the continuance of the estate in the male line, of William the grandson.

That a contrary construction would lead to this absurdity, that William, the breaker of the condition, might keep the estate for his life, though he should live forty or fifty years beyond the seven years limited for settling Batsons (which, by the deed of 1722, he ought clearly to do), and yet the portions of the younger children of William would be forfeited; not only so, but the portions of the children of Rauffe would also be forfeited, though they were directed to be paid after the death *of [*283] Rauffe and his wife. That they were charged on the same term with the portions to the children of William, and that there was a power given to raise the portions of William's younger children in his life, if he should so choose. That it was not probable William, the grandfather, should mean to defeat them, as charges subsequent to William's life-estate, when he had given a power to raise them in William's lifetime, had charged them upon a term prior, and had at all events given them 3000*l.* charged upon that term, in case William should not execute his power to charge 4000*l.*

That if William the grandson had left issue male, it would be very extraordinary for the plaintiff not only to demand Hannington as forfeited, but also Batsons, where the express condition was that only Hannington should go over; and that the accident of William's leaving no issue male, which had drawn the sting of the condition, should make any difference in the construction of the proviso in the deed of 1722. If the condition became impotent, it was not the fault of William, the grandson.

That as to the having elected (supposing it a case of election) there was no evidence of it; for the execution of the power given by the deed of 1722 might be, and in fact was, under a conviction that he had a right to charge, without subjecting anything but the estates subsequent to the life interest, to forfeiture, for not conveying pursuant to the deed of 1722.

That as to compensation, none was due, for William the grandson had done no more than he had a right to do.

This day his Honor gave judgment.

The *Master of the Rolls* stated the case, and went on, to the following effect:—

The bill insists, that William, who was tenant in tail of Batsons, should make an election of Hannington, or renounce all advantage under the deed, and that William was bound to conform to all the uses of the deed of 1722, under which he claimed. It is now settled that no man can claim under a deed, or a will, without confirming the instrument under which he claims; therefore William could not be entitled to take any benefit of the settlement of 1722, without confirming that settlement.

[*284] It is contended, that he *has made his election to abide by the deed of 1722: but I cannot say, that he has done enough to make an election; on the contrary, he has refused, for he has suffered a recovery, to give the estate another course. Then the questions are, whether William was bound to give up all benefit of the deed of 1722; and whether the powers which he has exercised are improperly exercised; and whether the person, who now claims, has a right to a compensation. The first question is, what William Freke the settlor intended as to Hannington; he had a right to settle it to such uses as he thought fit; he might have given it, so that if the grandson became possessed of Batsons, Hannington should go over. What he has thought fit to do is this: he has given William the grandson an estate for life; he has given him a power of jointuring, under certain conditions; he has also given him two other powers, one of leasing, which he has exercised to its utmost extent, also a power of charging it with 4000*l.*, which has also been exercised. Then it is contended, that he could not intend to give William these powers, unless he complied with the condition, and suffered the recovery. But I am not prepared to say, that William Freke, in exercising these powers, contravened the intention of the settlor; otherwise I would give the plaintiff a compensation for what he loses by the exercise of the powers. The deed itself is the only criterion by which to judge of the settlor's intention, and there, so far from having declared that if he should neglect suffering a recovery of Batsons, he should forfeit Hannington, he has left him in full possession of his life estate. The words of the deed are not at all doubtful, there is not a word in it like a condition to settle Batsons; and I am desired to insert a clause, imposing a condition not implied in the deed. I am clearly of opinion that he was tenant for life, without any restriction, expressed or implied, upon his exercising the powers. It is clear that, in all events, William Freke was to have his estate for life: but it is said, upon his not complying with the condition his powers were to cease: but in no case can a court of equity presume a condition in a deed. As to the leases, if they are not made according to the power, the owner of Hannington may get rid of them at law. Then it is asked, can it be conceived the settlor meant the Hannington estate to be so charged, unless Batsons was made subject to the same uses? Perhaps we may be surprised at this, but I must read the deed, and where is the condition imposed? It might have been [*285] as easy to have said, that *on default, his powers in Hannington should cease. It is contended, that, under the very words of the deed, the powers cease, he having said that all estates subsequent to the life-estate should cease. Upon this part I have had some doubt; but, on the best consideration I can give it, I think I should do too much violence to the words of the deed, if I carried them so far as to say this was the true construction, and I cannot find sufficient in the deed to warrant this. He has given him an estate for life, with powers with which the estate would be loaded after his death. The grandson has not exercised the

power of jointuring, but he has the other powers, and there is nothing to put an end to the powers at his decease. (c)

By coming here, the plaintiff seems to show that he could not venture the question on the leases in a court of law; but if the leases are good, the charge must be so likewise.

I admit, the Court might interfere in respect of the term of 500 years, being prior in point of limitation; and that, if I thought the charge bad, I could restrain the trustees from raising the 4000*l.*, but I do not find that the powers are given under a condition to settle Batsons; therefore, I think I must dismiss the bill entirely.

I do not mean to intrench on the rule (3) that no man can take an interest under a deed *or will, without confirming the deed *or [*286]

* The doctrine of election has been, in general, confined to the cases of wills; that the party should, in like manner, be put to his election, where he claims under a deed, (3) was determined in a case of *Bigland v. Huddleston* [vide etiam, 2 Scho. & Lefroy, 266], 27 Jan. 1789, which was as follows:—Robert Walves, the paternal grandfather of the plaintiff, by will dated 15th July, 1780 (having devised real estate), among other things gave to his daughter Anne, the plaintiff's mother, the sum of 8000*l.*, and directed his trustees to cause to be paid 4000*l.*, part thereof, to her younger children, at the time of her death, if any such should be, equally to be divided among them; and if there should be but one such child, then to such one child. He gave a like legacy to his other daughter, in the same manner, and gave the residue of his personal estate between them. Previous to the marriage of plaintiff's father, George Bigland, with the said Anne, a settlement was made, by indenture, 7th and 8th June, 1781, whereby the father settled Bigland Hall to the use of himself for life; remainder to trustees, to preserve, &c.; remainder to Anne for life; remainder to trustees; remainder to first and other sons in tail male; remainder to daughters, as tenants in common, in tail; remainder to himself in fee; and Anne conveyed her legacy of 8000*l.*, as to one moiety thereof, to her husband absolutely; and as to the other moiety, to trustees, to pay the interest to George for life; remainder to herself for life, if she survived; then to pay the principal to the younger children of the marriage equally: the shares of the son to be payable at twenty-one, those of the daughters at twenty-one, or marriage; and if but one such child, then to such child, with survivorship; and a proviso was made for the younger children of Anne by any other marriage; and in case there should be no child of the marriage, one moiety to be paid to George Bigland absolutely, and the other, to such uses as Anne should direct. She then conveyed the residue, which she took under her father's will, to the trustees; as to 6000*l.* part thereof, to pay the interest to George Bigland, for life; then to pay the principal thereof to the younger children of the marriage; and, in default of younger children, then as she should appoint; and, in default of appointment, to her next of kin; and as to the remainder of the said residue, plate, household-goods, &c., subject to other trusts. The marriage took effect, and 31st January, 1781, Anne died, leaving the plaintiff her only child, and without making any appointment. The bill was filed on the part of the plaintiff, claiming to be entitled to the 4000*l.* moiety of the 8000*l.* legacy given by the grandfather's will, and also a contingent interest in the 6000*l.* and the trust estate; praying that the plaintiff's rights might be declared, and the sum secured for the plaintiff, during his minority. The father, by his answer, claimed one moiety of the 4000*l.* in his own right, and the other as personal representative of his wife; and all the answers submitted a doubt as to the 6000*l.* whether the plaintiff was not excluded from that, as being an eldest and only son, and the father submitted, whether he, having obtained administration, was not entitled.

The decree ordered an account of the grandfather's personal estate, and that it be divided into moieties, and out of one moiety which belonged to Ann Bigland, 6000*l.* pursuant to the settlement, be deducted, and 3000*l.*, one moiety of the 6000*l.*, with a moiety of a moiety, of the residue of the personal estate, be paid to George Bigland: and further ordered, that the remaining 3000*l.*, and the surplus of the moiety of the personal estate of the testator, be paid into the Bank, and laid out; the dividends to be paid to George Bigland, for life, and at his decease, the parties to be at liberty to apply: and as to the 4000*l.* the Master was directed to inquire, whether it would be for the benefit of the infant to take under the settlement of the 8th June, 1781, or to claim the 4000*l.* against the settlement.

(3) See per Lord Redesdale C., in *Moore v. Butler*, 2 Scho. & Lefroy, 266; referring also to *Chetwynd v. Fleetwood*, in Dom. Proc. (which case in the octavo ed. of Bro. P. C. is 1 vol. p. 300); vide etiam *Green v. Green*, 2 Meriv. 86, et seq. The Editor has been favored with a MS. note of his Honor's judgment in the principal case; which, if it had been in print at the time when Lord Eldon C. decided the above case of *Green v. Green*, might, perhaps, have assisted his Lordship on a dubious and long-considered point. The doubt, which Lord Eldon considered as undecided (2 Meriv. 92, et seq.), was, "Whether, upon a party electing, under a settlement, to take one of two beneficial interests, he is bound to give up the other absolutely, or only to make a compensation for it." The Editor is aware that, in

(c) See Sugden on Powers (4th Lond. ed.), 145.

will. But I do not think the intention here sufficiently appears, otherwise I would take care it should be complied with, either by setting aside the uses, or giving a compensation.

The bill was therefore dismissed as to all but what prayed the delivery up of some deeds, &c., in the possession of the trustees.

the undermentioned note of his Honor's judgment, the MS. puts the case in the alternative, thus: "If the party had made an election, the plaintiff should either have the thing which, by election, the party had taken upon him to convey, or a compensation;" but, at the same time, the Editor cannot avoid feeling the force of the first clause of the position. Were the Editor at liberty to state his opinion upon his Honor's meaning, he would say, the plaintiff must have the thing undertaken to be conveyed, if he can have it (in the nature of things), or a compensation (in the event only) if he cannot have it.

Sir J. Simeon's note of the judgment is as follows:—"The M. R. said, he did not at all mean to impeach the rule of election, which had been insisted upon in argument for the plaintiff, but on the contrary: whatever doubts might have been held formerly, whether a person should be bound to elect under a deed, as well as under a will, it was now established, and, in his opinion, upon very clear grounds. But that this was not a case of election; and, if it were, that William, the grandson, had made no election to bind him; if he had, the plaintiff should either have the thing which, by election, the party had taken upon him to convey, or a compensation for it. That this was the case of a condition expressed by deed; and that whatever intention might be entertained beside, or contrary to that expressed, he could not violate the deed to get at it; nor could he judicially say such was the intention of William, the grandfather, or any other than what was expressed. A forfeiture was annexed to the making of a jointure, except under the terms of the deed, to take place immediately upon the breach; but the powers of leasing and charging were given absolutely; and none but estates subsequent to the life estate of William, the grandson, were defeated by not conveying Batsons; and though the conveyance was directed to be made in seven years, the life estate was expressly saved.

"Then, as to the charges, the only question was, whether they were to be considered as estates subsequent to the life estate, which, he thought, they clearly were not.

"As to the powers of leasing, whether they were well executed or not, was a pure question at law, and might be tried in ejectment."

A most elaborate Note, upon the question thus raised between absolute forfeiture and compensation has been published by Mr. Swanston, since the above went to press. It is annexed to the case of *Gretton v. Haward*, 1 Swanst. Rep. 433, et seq., where (it will be seen) Mr. S. inclines to the latter doctrine. Upon the subject of election generally, see further, *ibid.* note 394, et seq., § and 2 Story, Eq. Jur. ch. 30, § 1085, and notes. See also *Blake v. Bunbury*, 4 Bro. C. C. 21, and notes; *Forrester v. Cotton*, 1 Eden, 532; *Chetwynd v. Fleetwood*, 4 Bro. P. C. 435. }

PIKE v. WHITE.

(No Entry.)

A custom (in a manor) that copyholds shall not be surrendered to the use of a will is bad. (1)
A surrender must be supplied for children, wherever the heir is provided for, though the provision be not from the testator. (2)

By articles previous to the settlement upon the marriage of George White, father of the plaintiffs, and of defendant Thomas White, with Mary

(1) Mr. Evans, in his Collection of the Statutes, thinks this position untenable in point of law, however desirable it may be for the legislature to interpose. (See 1 vol. 473.) The reasoning seems to be to this effect: as lands in common socage, or estates generally at the common law, were not devisable until the statute 32 Hen. 8, so copyholds (originating upon the same feudal principles), unaffected by any statute, might generally be considered as incapable of passing by devise, without the express permission of the lord; so that in effect

(2) Vide *Lindopp v. Eborall*, ante, 188; and *Chapman v. Gibson*, ante, 229, et seq. with the Editor's notes.

The necessity of surrenders to the use of wills, where surrenders are within the custom of any manor, is now dispensed with by stat. 55 Geo. 3, c. 192. Mr. Evans, who prepared the bill, wished to include all such copyhold and customary estates and interests, as a testator could in any way have disposed of; but it was not thought expedient for the act so to pass. See Mr. Evans's 1st vol. before referred to, pp. 473, and 494, notes.

Wayt, his wife, 19th May, 1752, George White, covenanted to convey his messuages, lands, &c., in Newton in the county of Wilts, to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to the use of Mary Wayt for life, [*287] dower, remainder to trustees for 500 years, in trust to raise a sum not exceeding 2000*l.* for younger children, in such shares as George White should appoint, remainder to the first and other sons of the marriage in tail, remainder to his own right heirs forever.

The marriage took effect, and George White and Mary his wife had issue, five children, the defendant Thomas White, his only son, and the plaintiff Sarah, Mary, Ann, and Jane his daughters.

By articles of agreement previous to the marriage of the defendant, Thomas White, with Mary Wood; George White, and Thomas White, covenanted to convey the messuages, lands, &c., in Newton, to trustees, to the use of George White for life, remainder to Mary his wife, for life, remainder to Thomas White for life, remainder to Mary Wood for life, remainder to trustees for a term of 100 years, to raise 2000*l.* for younger children, and, after reciting the above agreement of 19th May, 1752, and the term therein contained, George White covenanted with the trustees, that he would not charge the same with more than 500*l.*

After making this settlement George White died, having made his will, dated 6th March, 1779, duly executed to pass real estates; and, thereby, gave and devised all his freehold, leasehold, and copyhold lands, &c., at Shrievenham, in the county of Berks, and elsewhere, to his wife for life, and after her decease, to trustees, in trust to sell the same, and apply the money arising therefrom, to and among all his daughters as should be living

the burden of proof that a copyhold might be surrendered to the use of a will would rather be supposed to lie upon those asserting the right of disposition by will.

Mr. Christian, in the note to his edition of Blackstone, 2 vol. p. 12, says; "By the stat. 32 Henry, 8, c. 1, all socage lands were made devisable, and two thirds of lands of military tenure; when these, at the Restoration, were converted into socage tenure, all lands became devisable, some copyholds excepted." And it is observable, that Lord Thurlow himself alludes to this exception in *Wardell v. Wardell*, ante, 117. Lord Eldon C., in *Church v. Mundy*, 15 Ves. 404, seems to state Lord Thurlow's opinion in the principal case, as applying to a custom negating all surrenders, that is to say, all that might operate either by will or by deed; rather than, as above expressed, confined to the use of a will only. His Lordship adding, that if there was no trace of such a custom [by will] "there must be some mode of disposition by deed (as in the case of customary freeholds), the want of which this Court would supply."

Mr. Scriven (who means to notice the point in his new edition of Copyholds, now in the press) seems to consider the matter thus:—As all copyholds were originally holden merely at will, it would be absurd to suppose any custom restraining a particular mode of alienation, when all kinds of alienation by a tenant were out of the question; so that in such a view, the position above noticed in the abstract, and in the judgment, is capable of support. Mr. Scriven, however, allows, that, as lords in process of time granted higher estates to their tenants, and allowed of alienation by surrender to various purposes, they might have imposed the condition, that the tenant should not surrender to any use which was not to take effect in his lifetime, by which means it is very possible that at this time there may be a prescriptive right in the lords of particular manors restraining surrenders to the use of a will; although, technically speaking, it cannot, for the reasons above mentioned, be pleaded, or stated as a custom. If, therefore, Lord Thurlow meant only to say, that a custom in restraint of a surrender to will, could not be supported, without intending to deny that the power of alienation incident to a grant in fee, might be restrained by an ancient prescription; then the observation would seem to be correctly reconcilable with legal reasoning, and the propositions of text-writers on the authorities. After even this limited discussion, it can hardly escape observation, that the reason why estates in common socage, or at the common law, were not originally devisable, arose out of the very same feudal principles; that the tenants of those lands had originally no greater interests than the tenants of copyholds had in theirs; and that, as in the instance of copyholds, the permission of the lord was requisite; so, in that of common law estates, there was a necessity for an express statute. To return now to the principal case, it seems very material to observe, that Lord Redesdale's notes intimate a doubt, whether Lord Thurlow did make any such general proposition as above stated; or say more than that the surrender must be supplied in the particular case before him.

at the death of his wife, and the issue of such as should be dead; and reciting that he had power to dispose of 500*l.* to be raised out of his estate at Newton, under the marriage settlement of his son (the defendant) Thomas White and his wife: the testator gave the 500*l.* among his daughters and their issue, as before directed, of the money arising by the sale of the trust estate.

The copyhold estate at Shrievenham (which the testator had bought of his wife) was not surrendered to the use of the will.

George White died, leaving the defendant, Thomas, his only son and heir, and the plaintiffs, his four daughters, and also leaving Mary his wife surviving him.

[*288] *Mary, the widow, entered upon the estates devised to her for life, as well as upon the copyhold estate at Shrievenham, as other copyhold estates of the testator, and upon the estate at Newton, settled on her for life, and enjoyed the same till her death, 16th August, 1788.

The bill was filed against Thomas and others, praying that he might be decreed to pay the 500*l.* charged on the estate at Newton, that the same might be raised by sale or mortgage of the term, and that the copyhold at Shrievenham might be declared to pass by the will, and that the surrender of the same might be supplied in favor of the plaintiffs, as being the children of the testator, charging, that the defendant Thomas is amply provided for by the settled estates of which he is in possession.

The defendant, Thomas White, by his answer, admitted the will, but, as to the copyhold at Shrievenham, he said he had been informed, and believed that, according to the custom of the said manors, copyhold lands holden thereof cannot be surrendered to the use of the will of the tenant, and are not devisable by virtue of any custom prevailing in the said manors, and therefore he submitted, they did not pass by the devise; he further insisted that, as the testator did not surrender the copyholds, they did not pass by the will: and that he ought not to be deprived of his legal right to the copyhold; and also contended that he was not to be considered as provided for, he not inheriting any property from his father, except the copyhold premises at Shrievenham; as he is advised, that he is a purchaser of the estate at Newton, under the marriage settlement of his father and mother, under which he was tenant in tail thereof, until he joined with his father in barring the estate tail, and took an estate for life therein.

Lord CHANCELLOR said, it was totally impossible to say that a copyhold surrendered to the use of a will should not pass thereby, and therefore he must declare the custom (if there were such a one) bad, (3) (a) and that, the defendant being provided for (it did not signify by what means), the surrender must be supplied.

(3) Lord Redesdale's notes intimate that Lord Thurlow laid down no such general proposition; and said no more, than that, in this case, the surrender should be supplied. See also per Lord Eldon C., in *Church v. Mundy*, 15 Ves. 403, 404, cited in note, (1) ante, 286, with the Editor's observations.

(a) Serjt. Hill, in a MS. note, in the Index to his copy of Gilbert's *Tenures*, after citing this observation, adds a *quære*, referring to the expression of Lord Thurlow, in *Wardell v. Wardell*, ante, 117, as implying that such a custom may exist. — *Eden*.

*TRASH, Administrator of WILLIAM CLAYTON, Esq., de- [*289]
 ceased, unadministered by SAMUEL YOUNG, deceased,
 original Administrator of WILLIAM CLAYTON, Plaintiff,
 AMY WHITE, Widow, GEORGE LONG, and MARY his Wife, WILLIAM
 GIBBONS, and AMY his Wife, SAMUEL BARNEY, and WILLIAM
 SCURR, Defendants.

(No Entry.)

Although non-payment of interest for twenty years on a mortgage where clear, and no demand, raises a presumption of payment, yet, on doubtful circumstances, and the original mortgage admitted, it was referred to the Master to inquire whether any interest had been paid. (1)

THE original bill was filed 2d May, 1787, by Samuel Young, as administrator of William Clayton, deceased, and prayed, that the defendants might redeem the mortgaged premises, or be foreclosed, and, for that purpose, stated as follows:

That George Mills, and Amy his wife, being entitled to the premises, subject to a mortgage made to Francis Simmonds, then deceased, and upon which were due to defendant Barney, as his executor, 205*l.*, applied to Clayton, to enable him to pay the same off, by a loan of money, to be charged by mortgage on the same premises; that Clayton advanced 200*l.*, and Mills paid the other 5*l.* to Barney. The mortgage to Simmonds was not assigned by Barney to Clayton, but delivered up to him; and a new mortgage, dated 13th September, 1760, was made by Mills and his wife, to Clayton, to secure the 200*l.* and interest. That the interest of the money was paid for some time, by Mills, but no part of the principal; and in the year 1767, the interest being then in arrear, Clayton delivered ejectments, which were not afterwards proceeded on, Mills having paid the arrears of interest then due. That Amy Mills died soon after, and in 1783 George Mills died, and Clayton also died, and administration was granted of his effects to the (late) plaintiff, Samuel Young; George Mills died intestate, leaving defendant, Amy White, and Elizabeth Mills, his only children and heirs-at-law. Some time after his death, Elizabeth Mills also died, having devised all her lands, &c. to Mary Long and Amy Gibbons, in fee, as tenants in common, who now claim to be entitled to the mortgaged premises; to whom the plaintiff applied for the mortgage-money, and upon this refusal *filed the bill, praying that defendant [*290] Barney, as executor of Simmonds, might be declared to be a trustee for him, and that the other defendants might redeem or be foreclosed.

The defendants, by their answers, said, they were strangers to the subject, yet they believed Mills mortgaged the premises to Clayton; that they

(1) The Court of Chancery in two cases (tempore Car. 1) relieved purchasers against claims under ancient sleeping mortgages, vide *Sibson v. Fletcher*, and *Hales v. Hales*, 1 Rep. in Ch. 56. But in a more recent case, the Court of Exchequer (Lord Ch. Baron Eyre, B. Hotham, and B. Thompson) held, upon long argument, and consideration of the above cases, that there was no general rule for presuming satisfaction of a mortgage after twenty years, or any other period; and that although a jury might find a mere bond satisfied after twenty years, yet where a bond is a collateral security to a mortgage, the mortgagee cannot be prejudiced by that; and ought in any case to be let in to establish his case in a court of equity, if he could. See *Toplis v. Baker*, 1 Cox, Ca. 118. This case was cited in the principal case under a wrong name. Vide postea, 291, and note (3).

It is observable that the course last adverted to was adopted in the principal case; and it is somewhat to be regretted that Lord Thurlow should be reported to throw out dicta contradictory to the cases adduced before him so often as appears in the reports of Mr. Brown. — N. B. In Mr. Cox's Rep. 123, *Hele v. Hele* is inserted, by mistake, for *Hales v. Hales*, ubi supra.

knew none of the circumstances of the transaction, but also believed that no fine was levied, and that as defendants believed Mills had no estate in the premises, but a right to take rents and profits for life in right of his wife, the premises were not affected by the mortgage for more than his life; they said they also believed that Mills for some time paid the interest, but observed, that it was not stated in the bill that any interest had been paid since 1756, although both Mills and Clayton lived seventeen years after that time, and believe no money has been paid since that time, and insist that, under the circumstances, it ought to be presumed that the 200*l.* and interest was paid in the lifetime of Mills, and insisted on the statute of limitations.

After the death of Young, the present plaintiff took out administration *de bonis non*, and filed the present bill of revivor.

The only question now was, whether non-payment of interest on a mortgage for upwards of twenty years, afforded a presumption of payment.

Mr. Lloyd, and Mr. Grimwood, cited the case of *Leman v. Newnham*, 1 Vesey, 51, to show, that interest not having been paid for twenty years, does not raise an absolute presumption of payment, in case of mortgagees; though the general rule is so, as to other securities, as bonds: but, in this case, it is admitted, there was a mortgage and a great arrear of interest due, which would take it out of the rule of the presumption, even if it was admitted to be so; at least, so far that the Court will send it to an inquiry before the Master.

Mr. Solicitor-General, and Mr. Ainge, argued, that there was a presumption, arising from the non-payment of interest, that the principal money had been paid. The security originally given was a mortgage from [*291] Mills and his wife, to Clayton; no notice was taken of the prior mortgage to Simmonds. The evidence of Barney is, that he received the money from Clayton; a fine was levied of the wife's estate in 1742; but this would not give the estate to the husband, without something further appeared, either from the recital of the deed, or otherwise to be the wife's intention. (2) This was the doctrine of the Court in *Edwards v. Lady Vernon*. Then all that appears is, that in 1760 the sum of 200*l.* was advanced, upon an agreement that Simmonds, or his executors, should convey to Clayton, but it appears that no such conveyance was ever made. Clayton had every notice to call on Barney. And no interest was paid from the year 1766, although both Clayton and Mills were alive till 1783. That no application should be made in this length of time is extraordinary, and raises the presumption that the money was paid. The presumption is analogous to the statute of limitations. They cited *Daykin v. Monk*, in the Exchequer. (3)

Mr. Selwyn, in reply. There is no rule upon the subject, at common law. The rule in equity is in analogy to the statute of limitations, *Aggas v. Pickerell*, 3 Atk. 225. In this case, although we do not show

(2) Vide *Jackson v. Innes*, in Dom. Proc. 1 Bligh, P. C. 104, et seq.

(3) This name is incorrect. The case will be found in Mr. Cox's Ca. Ch. 118, under the name of *Toplis v. Baker*; and it was cited in the principal case from Lord Colchester's MS. note, now before the Editor. It came on as a cause, and cross-cause; the name of the former was *Darkin v. Marye*. (Lord Colchester's MS. notes.) Mr. Brown seems not only to have mistaken the name, but the side on which it was cited; or the use intended, at all events: for it is a direct authority in favor of the plaintiff, showing, that in the case of a mortgage with a bond as collateral security, though a jury might presume a mere bond to be satisfied, the case of a mortgage with a bond was very different; and that the Court would at any rate let the mortgagee in to establish his case in equity.

instances of payment of interest or demand, we only wish to have an inquiry into the matter.

Lord CHANCELLOR, during the argument, said, that if the case was clear, that no interest had been paid for twenty years, he had always understood, that it did raise the presumption, that the principal had been paid; but there must not only be nonpayment of interest, but no demand: and, in that case, he thought the presumption, on a mortgage, as strong as that at law; (4) (a) but, upon the circumstances of the present case, he referred it to the Master, to inquire (5) whether any interest had been paid, with leave to examine the parties upon interrogatories.

(4) It seems questionable, whether Lord Thurlow said this, because the case of *Toplis v. Baker, &c.*, which was adduced before him, distinctly marks the contrary. See that case, 2 Cox, 120, and p. 123.

(5) "Whether any and what demand had been made, or interest paid?" &c.

"N. B. The Chancellor did not specify within what time the inquiry was to be confined, viz. within twenty years, &c." From Lord Colchester's MS. note.

(a) 2 Story, Eq. Jur. ch. 27, § 1028 h, § 1620; *Stewart v. Nichols*, 1 Taml. 307; *Christophers v. Sparke*, 3 Jac. & Walk. 223. See *White v. Panther*, 1 Knapp, 228, 229; *Dexter v. Arnold*, 3 Sumner, 162; *Giles v. Baremore*, 5 John. Ch. 545, 552; *Collins v. Torry*, 7 John. Ch. 278, 283; *Jackson v. Pierce*, 10 John. 414; *Jackson v. Wood*, 12 John. 242; *Hughes v. Edwards*, 9 Wheat. 439; *Sackett v. Sackett*, 7 Wend. 94; 2 Phil. Ev. (Cowen & Hill's notes, 1st ed.) 316, 317, and cases cited; 4 Kent (5th ed.), 189; *Cook v. Soltan*, 2 Sim. & Stu. 154; *Ross v. Norvell*, 1 Wash. 14; *Belknap v. Gleason*, 11 Conn. 160.

[The general rule, that a redemption shall not be decreed, where a mortgagee has been in possession twenty years without any acknowledgments of its being a mortgage (though denied in *Toplis v. Baker*, 2 Cox, 118, where it was also said, that if a jury should, on the same ground, presume the bond satisfied, which is given as a collateral security to the mortgagee, yet that the mortgagee would not thereby be prevented from showing the truth of the case, if in fact the money had not been paid), has been frequently acknowledged. *Whiting v. White*, 2 Cox, 290; *S. C. Coop. Ch. Rep. 1*; *Edsall v. Buchanan*, post, vol. iv. 254; *S. C. 2 Ves. jun. 83*; *Blewitt v. Thomas*, ib. 669; *Lake v. Thomas*, 3 Ves. 17; *Hardy v. Reeves*, 4 Ves. 466; *Smart v. Hunt*, ib. 478, n.; *Carew v. Johnson*, 2 Sch. & Lef. 295; *Hansard v. Hardy*, 18 Ves. 455; *Hodde v. Healy*, 1 Ves. & Bea. 536; *Barron v. Martin*, *Coop. Ch. Rep. 189*. And notwithstanding the opinions and doubts to the contrary, Sir Thomas Plumer has determined, upon the most satisfactory grounds, that parol evidence of the defendant's having treated it as a mortgage, is admissible. *Reeks v. Postlethwaite*, ib. 161. But where the mortgagee was in possession for more than twenty years during the life of a tenant by the curtesy, from whom the equity of redemption was conveyed to him, yet the heir of the wife was not barred. *Corbett v. Barker*, 3 Aust. 765, reversing a decree, ib. vol. i. 138. — *Eden.*]

*Nabob of ARCOT v. The EAST INDIA Company. [*292]

Lincoln's-Inn-Hall, 23d July. [Vide S. C. 1 Ves. jun. 371, and Hargr. Jurid. Argum. 375.]

(Reg. Lib. 1790. B. fol. 422.)

Plea by the East India Company, to a bill for an account, filed by the Nabob of Arcot, that, by charters confirmed by act of Parliament, they had certain powers, by virtue of which the acts were done, overruled: it not setting forth the contents of the charters, and acts of Parliament. (1) [The plea having been once amended before, the Court refused to allow any further amendment or liberty to plead anew.] (2) [A plea against the jurisdiction of the Court must show what Court has the proper jurisdiction.] (2)

THE bill stated that the defendants, about the year 1781, applied to the plaintiff, for payment of a debt due to them from the plaintiff, in

(1) Although this plea was overruled, the bill was afterwards dismissed at the hearing, on the ground that the subject was matter of political treaty between the parties as independent sovereign powers, and not of municipal regulation here. See the reports of it, postea, 4 vol. 180, and 2 Ves. jun. 56. Vide etiam, Beames, El. Pl. 73.

(2) See the contemporary reports, 1 Ves. jun. 372, margin, &c.

respect of expenses incurred on his account; which demand the plaintiff being unable to comply with, he proposed to give, and the then governor of Fort Saint George in the Carnatic, on behalf of defendants, consented to accept of, an assignment of the revenues accruing to the plaintiff, as Nabob and Lord paramount of the Carnatic, as a security for the said demand.

That, in pursuance hereof, an instrument in writing was prepared and executed, purporting to be an agreement between the plaintiff and Lord Macartney, the then governor, dated 2d December, 1781, whereby, in consequence of plaintiff assigning to the governor the revenues accruing to him as Nabob, the governor and council were to account to him for the same.

That, in pursuance of this agreement, Lord Macartney was empowered to collect, and did receive the same from December, 1781, to June, 1785.

That in June, 1785, defendants restored plaintiff to the receipt of the revenues, and, by another agreement, dated 21st June, 1785, plaintiff agreed to pay his proportion of the current charges, as stipulated by defendants, to be finally settled by treaty, between plaintiff and the governor and council of Madras; and, until the exact proportion could be ascertained, the plaintiff consented to consider it at the annual sum of four lacks of pagodas, by certain kists or instalments, and the plaintiff also agreed to pay the annual sum of twelve lacks of pagodas, in discharge of debt due to the defendants.

The bill charged that the above sums, which had been paid by the plaintiff to the defendants, and the revenues received by the defendants whilst in possession, were more than sufficient to repay the debt [*293] defendants their debt; and prayed an account, and that the defendants might pay any balance that might appear thereon to be due to plaintiff.

To this bill, the defendants pleaded in bar, and for plea said, that, by divers charters, or letters patent, and deeds, and also by divers acts of Parliament confirming the same, they have given to them, together with other liberties, privileges, and licenses, the whole entire and only liberty and privilege of trading and trafficking unto, and from, the East Indies, and all the countries and parts of Asia beyond the Cape of Bona Esperanza, where any trade or traffic of merchandise is or may be had; and that, by the same charters, &c., they have free liberty and license to send either ships of war, men, or ammunition, into any of their factories, or places of their trade, in the East Indies, for the security and defence of the same; and to choose commanders and officers over them, and to give them power and authority, by commissions under their common seal, or otherwise, to continue or make peace, or war, with any prince or people, that are not Christians, in any places of their trade; and also to right and recompense themselves upon the goods, estate, or people of those parts, by whom they shall sustain any injury; and that, under and by virtue of such liberties, &c. they have acquired, and possess large territorial possessions, particularly in the Carnatic, on the coast of Coromandel, in the East Indies; and upon and for the defence and security of which, and the benefit of their trade, they have, from before, and ever since, the time of making of the several instruments in the complainant's bill mentioned, and of the several dealings and transactions, matters and things, taking place between these defendants and the complainant, in the said bill mentioned, raised, and maintained and kept, and do now maintain and

keep, a large military force. And the defendants, for plea, further said, that the complainant is a sovereign and prince, within such the places of their trade aforesaid, and is not a Christian; and he also, at the time of making the said instruments, &c., had and enjoyed, and does now hold and enjoy, divers large territorial possessions, within such places, and particularly in the Carnatic, aforesaid; and that the said instruments in writing, in the bill mentioned, and the several dealings and transactions therein mentioned, were entered into, and done by these defendants, by virtue, and in exercise of, the liberties, &c., so granted to *them, as aforesaid, and the complainant, as such prince, afore- [*294] said; and that the same, and all the dealings and transactions mentioned in said bill, do respectively relate to matters transacted between them, in regard to peace and war, and the security and defence of the territorial possessions belonging to them respectively, in the Carnatic, aforesaid; and these defendants are advised, and submit, that such instruments, dealings, and transactions, being so entered into, and done, or any thing relating thereto, are not, nor is, subject to any municipal jurisdiction, nor cognizable in this Honorable Court, or any court of justice; which matters these defendants aver and plead in bar, both to the discovery and relief sought by the bill.

This plea having been set down to be argued,

Mr. Attorney, and Mr. Solicitor-General, Mr. Mansfield, Mr. Rous, and Mr. Stratford, argued in support of the plea.

A bill on this subject cannot be entertained by this Court; transactions between sovereign princes, or federal transactions, cannot be liable to any municipal jurisdiction. No law can apply between them, but the law of nations. These are such transactions: for, by the charters and acts of Parliament, the East India Company are constituted a sovereign power; or, at least, are the delegates of the sovereign power of this country, for the purposes of making peace and war. The power they exercise is the power of the State; the war, when commenced, is the war of the State. The charters operate as a commission from the State, transacted by the the Company, as its delegate. If such a power were delegated to a general, the war, when made, would not be the war of the individual, but of the State delegating. But it is sufficient, if one of the parties be a sovereign power, to take it out of municipal jurisdiction; and the plaintiff is allowed to be a sovereign prince: the treaty of Paris, in 1763, comprehends him as a sovereign prince; and both the treaties of 1781, and 1785, are referable only to his power as a sovereign; they related to the mutual defence of their respective territories. A municipal court could not enter into a discussion concerning them, without entering into the whole connection between the Company and this prince.

Another objection to the bill is, that the Court cannot enforce submission; in case the plaintiff, on the account taken, should *appear to be the debtor, how could the Court enforce payment? [*295] If the Court is not capable of giving relief, it is good ground for a plea to the relief, and the discovery. From the character of the persons, the Court could not enforce its decree; even if this was between individuals, it would be difficult for the Court to enforce it, from the difficulty of putting a receiver upon an estate in India; but that cannot be done on the territory of a sovereign prince; no more than it could if the matter were an agreement between the Courts of England and France. Can the Court enjoin a war between the parties? Your Lord-

ship will not entertain a suit that cannot be executed by the common means.

Then suppose a decree for the plaintiff, and the money ordered to be paid to him, he may be adverse to the interest of the Company in India, and the money, when paid, might be applied to adverse purposes. This, if known before the decree, would be no answer in a court of municipal jurisdiction; but, according to the law of nations (the rule between sovereign powers), it would be a good reason against the decree: suppose 500,000*l.* found due to the plaintiff, and that, by joining adverse powers, he had committed devastation on the territory of the defendants, could this be considered as matter of set-off?

But by the act of Parliament of the 24th and 26th of the present king, the East India Company are prevented from giving this discovery. They are under the absolute authority of the Board of Control, and cannot act but under their direction. Suppose their orders and those of the Court should be contradictory, what a situation the Company would be in! The Board of Control, too, may give secret orders; the Company could not show that they were contradictory, without breaking through that secrecy; and the Board of Control may send secret orders to the presidencies in India, contrary to what the India Company might be decreed to do. If such a case be possible, the Court could repeal the act of Parliament.

But there is no necessity for such a bill, as the affairs of the Company are administered by commissioners appointed by the King; the Nabob therefore might obtain justice by an application to the crown. Thus the Dutch East India Company applied lately, by memorial, to the crown.

[*296] *With regard to the form of the plea, it sufficiently points out the state of the parties, and that the matter in question is matter relative to peace and war, which cannot be the subject of municipal jurisdiction.

Mr. *Mitford*, Mr. *Anstruther*, Mr. *Adam*, and Mr. *Fonblanque*, argued against the plea.

The question is, whether this plea can be allowed. To answer this, we must examine what is the nature of a plea in this Court. It is a special defence, which submits whether, under the circumstances contained in the plea, and not stated by the bill, the Court sees enough of the case not to go on; it must therefore state facts to show that the Court has no jurisdiction. The whole case must appear on the face of the proceedings; because it must appear, in case of a bill of review or appeal. Nothing can be read upon a plea, the whole must appear upon the plea itself. Now, what is the subject of this bill? It is a mere bill for an account. It states the transaction between the plaintiff and defendants, and that, on the account taken, the Company are indebted to the plaintiff. The plea admits the facts of the bill, but says, that there are reasons why the plaintiff shall not have his remedy; it refers to charters, deeds, and acts of Parliament, but does not set them forth; so that it is impossible to discover what powers are given. Those powers do not appear by the acts of Parliament (which only enable the crown to grant charters), but by the charters themselves, which, therefore, ought to be set forth; for your Lordship is to put a construction upon them, not to take that imposed by the defendants: therefore the plea, not setting them forth, is bad. The plea says, that the transactions between the plaintiff and defendants were under, and by virtue of, the liberties granted to them.

Whether they were so or not, is an inference to be drawn from facts, which are not stated; in order to draw the inference, they should state the facts from whence it is to be drawn. Suppose a party was to plead, that he is a purchaser for valuable consideration; Lord Hardwicke said, he must set forth his purchase deeds, that the Court may see that he is so. (3) *Chamberlain v. Knapp*, 1 Atk. 52; *Hughes v. Garth*, Amb. 401. (4) In this case, the plea has not set forth the facts sufficiently at large. Then, with respect to the substance of the plea, it is a plea to the persons of the defendants, and of the plaintiff. With *respect to the defendants, they have been considered as inde- [*297] pendent, or delegated sovereigns; and it is said, that this is not matter of municipal jurisdiction, because it relates to peace and war; but, in fact, the matter stated is a mere account, not relative to matters of state; and certainly, in matters of trade, the East India Company are amenable to this Court, and if, in that respect, they are amenable, they cannot be considered as a sovereign power; they are only a creature of the laws of this country, to perform functions, which could not otherwise be executed; and, for that purpose, invested with powers, which could not be given but by Parliament, as the having a military force, &c. But those powers do not constitute it a sovereign state; so far from it, it speedily will not exist without some act of the sovereign power of this country to continue its existence. Therefore, the Company is merely to be considered as a corporation, and, of course, amenable here. They are also in this part of the plea inconsistent with themselves; upon other occasions, they have stated themselves to be subjects of the Great Mogul. Then, with respect to the plaintiff's being an alien sovereign prince; as an alien merely, if not an alien enemy, he may stand as a suitor in a Court of justice. As a prince, there is no objection to his suing here. It is said, as a prince, he cannot sue here; it is true, he is not compellable so to do, but, if he chooses it, he may. He has two ways of doing himself justice, he may apply to the government, or may make his appeal to the ordinary laws of the country. The writers on the law of nations, say that reprisals are not justifiable till after both methods have been tried without success. In this case, the Nabob is applying to the ordinary justice of the Court; if he fails there, he may apply to the exertion of the sovereign power. But there is no reason why, in the case of a debt from a subject of this country to a sovereign prince, there should not be such a remedy. There are instances in the books, where the King of Spain has sued for duties due in South America, and the only question was, whether the suit ought to be in the Court of Admiralty, or in the King's Bench, 1 Rolle's Abridg. 528, 532; Hobart, 78; Moore, 814; 1 Rolle's Rep. 336; 2 Rolle's Abr. 491, and it was lately laid down by Lord Kenyon, in *Foliot v. Ogden*, 3 Term Rep. 726, that a sovereign power might sue. Even in the case of indelible sovereignty, as between the King of Great Britain and the Nabob, if the matter was not of *a federal [*298] nature, a foreign prince might sue, and your Lordship indorse a petition of rights. In Ryley's *Placita Parliamentaria*, you will find a petition for the maintenance of foreign troops, entertained, and judgment for the persons who sued. It is well known that the laws of this country are the only means of making the subject answerable for his conduct: and the Nabob of Arcot must be presumed, in his transactions with them,

(3) See Beames, El. Pl. 223, et seq.

(4) S. C. 2 Ca. temp. Lord Northampton, 168.

to have known this, and that he must apply to the laws. Even in questions between subjects, courts of justice must often take notice of things not within the reach of mere municipal laws; they must often take notice of treaties; in cases of capture, they must take notice that states are at war. *Molly*, b. 1, c. 1, cites 1 *Roll. Rep.* 175, where the Court were obliged to see whether the King of Spain and the Emperor of Morocco were at war; this shows, they must often take notice of treaties. Suppose an agreement was made between this country and another, for men, and the commander came to England without accounting, there could be no doubt of the right of the sovereign power to sue. As to the India Company, a question might arise between them and the crown, as to troops; there is no doubt, an information might be exhibited in this Court. As to the remedy not being mutual, that is so in many cases; wherever the crown sues, the remedy is not mutual. So an alien may sue, who cannot be sued. In all countries the creditor may sue, though the defendant could not sue him. So, with respect to the Nabob, suppose the balance should be in favor of the Company, they have the same remedy now they had before. The East India Company are not in a higher situation than Lord Baltimore was, in the case in 1 *Vesey*, 444. He was a dependent sovereign (if such phrase may be used), having the right of peace and war, and of coining; yet, a dispute about boundaries arising, and an agreement entered into on the subject, a specific performance was decreed. (5) So in the case of the Earl of *Derby* v. the Duke of *Athol*, 1 *Ves.* 202, as to the Isle of Man. Wherever there can be a remedy *in personam*, a proceeding may be had in a court of equity. (a) Then it is contended, that they cannot give this discovery, because they may be prevented by the Board of Control; the Board of Control have nothing to do with it: they may as well say they are prevented from paying a bond, or any other debt, as that they cannot discover the state of this account. With respect [*299] to their applying to the sovereign power here, if that *means the legislature, it is extraordinary that, in a common matter of account, the Nabob should be driven to an application to the legislature.

Mr. *Attorney-General*, in reply. Two questions arise, whether the plea is good, 1st, in respect of its form, 2d, in substance. The gentlemen on the other side have avoided taking the whole matter together, as stated by the bill; they have avoided the agreement, because it clearly appears to be a federal treaty, arising out of peace and war. The bill is brought for matter of account; but it states the agreement of 1785, the subject-matter of which was, their contribution of charges in carrying on a war; the bill refers to the treaty, and makes it part of it, and the

(5) See the decree in that case from the *Reg. Book* (A. D. 1749, B. fol. 439), in the *Editor's Supplement to Vesey*, p. 194, et seq.

(a) Courts of law have no jurisdiction in local actions, respecting lands lying in Ireland, the Isle of Man, the Colonies, &c., nor can courts of equity affect them. Countess of *Derby's* case, *Keilw.* 202, affirmed 4 *Inst.* 283; *Cartwright v. Pettus*, 2 Ch. Ca. 214. Sir William *Pettit's* case, cited 1 *Vern.* 421; *Skinner's* case, cited arg.; *Fabrigas v. Mostyn*, 20 *How. St. Tr.* 215. But a court of equity can act upon the person of one residing here, and therefore with regard to any contract made concerning such lands, or any equity arising between persons in this country respecting them, the Court will hold the same jurisdiction as if they were situated in England, and imprison the party disobeying its orders. *Archer v. Preston*, 1 *Eq. Ab.* 133; *Earl of Argyll v. Muschamp*, 1 *Vern.* 76; *Lord Kildare v. Eustace*, ib. 419; *Toller v. Carteret*, 2 *Vern.* 494; 1 *Salk.* 404; *Penn v. Lord Baltimore*, cited supra. *Earl of Derby v. Duke of Athol*, ibid.; *Roherdeau v. Rous*, 1 *Atk.* 543; *Foster v. Vassal*, 3 *Atk.* 587; *Lord Cranstown v. Johnston*, 3 *Ves.* 170; *White v. Hall*, 12 *Ves.* 321. See the question whether an issue can be directed by a court of equity to try the validity of a will of lands abroad, discussed in a note to *Pike v. Hoare*, 2 *Eden*, 185. — *Eden*.

eighth article of the treaty is expressly for military expenses, and the whole concludes by a stipulation that the agreement should have the effect of a treaty. The common defence of their respective territories was the subject of the treaty. It was a subsidy treaty, which has always been considered as a federal treaty. The plea adverts to the acts of Parliament, and to the charters. It was not necessary to set them out; because the acts of Parliament are referred to, and many of them contain the charters. Then the plea states that the acts were done in pursuance of the privileges granted to the Company, and goes on to say that the same relate to peace and war, and the defence of their territorial possessions. The plea sufficiently confines the transactions to the Carnatic, putting the circumstances together; but supposing, in a case of this sort, there should be any omission, it would seem but reasonable to ask leave to amend, in order to bring a question of this importance properly before the Court. The next question is, whether the plea is, in point of substance, a bar. It states that the Company are endowed with powers of making peace and war; a defensive war is clearly alluded to. The same fallacy has run through the argument of all the counsel, they do not refer to the mixed nature of the Company, which though, here, considered as a trading Company, is, there, in the character of a sovereign power. Most undoubtedly the Nabob's suit might be brought before the mayor's Court of Madras. The consequence would be, that the account must be taken before their inferior officer, and nothing but confusion could arise from the suit being brought before such a tribunal. But this account cannot be matter of municipal jurisdiction, because the defendants could not [*300] have an opportunity of defending themselves in such a suit. It is impracticable for the Company to bring in reasons before this Court. A new creature has arisen, which prevents the Company revealing to this Court the state in which it stands with respect to the country princes. There is an essential difference between sovereigns and individuals. As to the cases which allow of a sovereign suing, they are certainly right, as the sovereign may certainly waive his sovereignty; but there is no case of one sovereign suing another. The case of prize being brought in a municipal court, arises from the law of nations; but no instance is produced of one sovereign power bringing an action against another sovereign power. Suppose the Danes, or any other European powers, to be parties to a treaty with the East India Company, how could the courts of either of the countries administer justice between them? In the present case, suppose the result of the account to be in favor of the Company, what remedy could they have? Another confusion must also arise: Suppose the states be called upon to act as states, upon the subject: are they, in that character, to obey the injunction of a municipal jurisdiction? Could the Court enjoin the Company from going to war? The distinction, with respect to jurisdiction, is between matters arising by treaty, and matters arising by contract. Where both parties have the power of the sword they must refer to the law of nations, as the only judge between them. In the case of the Dutch Company, why was a memorial presented, and not a common action brought? because, where the Court cannot put justice in execution, the tribunal is inadequate to the jurisdiction. It is necessary for the East India Company to know, who are to be the expositors of their treaties. If the doctrine held to-day prevails, their treaties will be the subject of investigation in the Courts in the East

Indies; but an account arising from a federal treaty, cannot be a proper subject of municipal jurisdiction. (b)

At the close of the argument, Lord CHANCELLOR spoke to the following effect: (6)

Whether another plea ought to be put in, or the defendants permitted to amend this plea, is a question of a different consideration from that now before me; because no motion has been made on that subject. I [*301] shall expect whenever they make *such motion, that the form of the plea they intend to put in shall be laid before the Court; for amendments, when moved, ought to be stated, that the Court may see whether it is material that the cause shall be delayed for the purpose of admitting them. (c)

The argument is so disproportionate to the state of the case, as it stands before me, that, in disposing of it, I shall not have occasion to go a great way, at least, not so far as the argument has gone at the bar.

To consider the plea in point of form, and in point of substance, seems to me to be an inconvenient distribution; because I do not know where to find the substance of a plea, but in the form of it: or what the parties mean to urge before me, but from the words they use; the form of a plea, and the substance of it, seem therefore to me to be much the same.

In a general view of the plea, it is perfectly new. It is stated to be a plea to the jurisdiction of the Court; but it differs from a plea to the jurisdiction in all the particulars by which those pleas have been described; because (as it has been truly observed) it is impossible to plead to the jurisdiction of any particular court, without giving another remedy to the party in some other court. Now this plea says, expressly, that the party has no remedy in any court of municipal jurisdiction whatever. I take it therefore, in fact, to be a plea in bar: as if it had been said *ex tali facto actio non oritur*; as if it had been gratuitous, or honorary, or of that species of contract upon which an action does not arise. And if it had been necessary, from the form of the bill, to have brought into the view of the Court that it was a demand of that description, the plea would have been a plea in bar to the action. And here the whole argument tends to the same end; that, considering the situation of the parties, and the contract that has been entered into, as having relation to that situation, the contracts

(6) Before the end of the argument, the Lord Chancellor proposed, that the question should be tried at law, upon admissions between the parties; but it was not acceded to. See Mr. Vesey's notes, in his report, 1 vol. pp. 330, 336.

(b) In the course of the argument for the plaintiff, the Lord Chancellor proposed, for the purpose of bringing the question to the point, that the Company should admit the agreement of 1781, and the fact (but not so as to bind them) that 500*l.* is due upon a balance of accounts, and that they promised to pay that *ex ratione*, and that the Nabob should bring an action in the Court of King's Bench for that sum; then, the bill standing over, nothing would remain but the account and examination. His Lordship said, if the defendants succeed in the King's Bench, they may plead with more confidence than now; if they fail there, the 500*l.* recovered will remain as a pledge. that if they could plead in the court of law against this demand, they would have the same advantage of it there as here; and the plaintiff could not go on with his bill; but if they could not answer it in an action, it would be very difficult to say they could here. But this proposal was not acceded to, the Attorney-General saying, the defendants did not mean to admit anything to be due. The Lord Chancellor also observed, that the King of Spain had been once outlawed, by Selden's advice, to prevent him from taking advantage of his suit; that the outlawry was bad enough, but good till reversed; therefore it was necessary for him to come in to reverse it, in order to take advantage of his suit. His Lordship said, he could not quote a better book for this than Selden's Table Talk. (Vesey). — *Eden*.

(c) 2 Madd. Ch. Pr. (4th Am. ed.) 273, 274; Newman v. Wallis, 2 Bro. C. C. 143.

are not the subject of an action. The plea, therefore, as I take it, is a plea in bar, not a plea to the jurisdiction of a particular court, but of all courts; and a plea to the jurisdiction of all courts I take to be absurd, and repugnant in terms. Even if the bill had stated all the case on which the argument on the side of the defendant relies, and had *brought it to be that species of treaty, which the law ought, for [*302] some reasons, to pronounce impracticable to be executed by courts of municipal jurisdiction; it amounts to no more than saying that, from the matter of the action itself, *ex tali facto non oritur actio*. (d)

In order to consider it in this point of view, it is necessary to see what the real state of the record is.

The bill states that the Nabob was in debt, or that it was alleged by the defendants that he was in debt, to them. That he pledged the revenues of the Carnatic, of which he was a sovereign prince, to the Company, and permitted them to receive such revenues, under a promise that they would account for them, and set them against the debt. He proceeds to state the agreement of 1785, which in the bill is stated to be an agreement not at all relative to that in 1781, but perfectly distinct from it, and is stated to be a contract, onerous on the part of the plaintiff; for, of the twelve lacks of rupees, that were to be allowed for current expenses, four of them were to be allowed in application to the payment of the existing debt of the Company, and other parts to other occasions.

It would be impossible to get on with an account, where both the parties were so delicate as not to state what those other occasions were; and I, who know nothing of the history of the Company, but what I know from this bill and plea, certainly do not know what they were: but still the observation I make is, that the treaty in 1785, as stated, was in its foundation, its effects and consequences, entirely distinct from that of 1781.

The bill, after stating this agreement, proceeds to say that the receipts, under the first agreement, have totally extinguished the debt; and consequently, that the Company ought to be accountable for the remainder, beyond what they can claim as a debt; and that the Company, having contracted with the plaintiff as private individuals, ought to account for the revenues of which they have been in receipt; and that they have received by that means, a sum, which, upon the account taken, will appear to be due to the Nabob. It has not been argued, that this, standing by itself, would be demurrable, or that it would not be necessary *to [*303] state something on a plea, to take it out of the predicament in which it stands in the bill, upon which there appears a reasonable demand for an account; but it has been argued, that there is enough in the plea, to show that this is what you call a federal agreement, by which one means a treaty between sovereigns, concerning the public business of each sovereignty, and it is insisted upon to be such a treaty; I state it without the words *peace and war*, because if I were to go into that part of the argument, and to consider it with a view to the question, whether *ex tali facto actio non oritur*, I must not confine it to peace and war; for I apprehend it would be impossible to contend on the general principles of municipal, as it is distinguished from federal, law, that the terms of an agreement which relates to peace or war, are in a different relation from the terms of an agreement that relates to any other public subjects of the aggregate bodies, which are called sovereign nations; and therefore the position is, that wherever two sovereign nations have contracted upon

matters respecting the sovereign bodies they represent, that the effect of the contract constitutes a species of obligation, *ex quo actio non oritur*. In order to apply this position to the present case, they have stated the Nabob to be a sovereign prince of the Carnatic: and that by law, I will not go further than to say that by law, and the municipal constitution of this country, the East India Company being clothed with an authority to make war for their defence, or the melioration of their situation in respect of trade or otherwise; that the Company being armed, by charters, and the municipal authority of this country, with these powers, stand in all respects, relative to the exercise of that power, in the same condition as if they were sovereigns, without inquiring whether they are independent sovereigns, or execute delegated sovereignty: neither of which propositions can, with any tolerable strictness, be true, for they are pure subjects. A fictitious body of subjects, formed by a charter, is as mere a subject as natural bodies in a state of subjection to the sovereign authority of the country, therefore they are pure subjects, to all intents and purposes whatsoever.

But the question remains, whether being armed with an authority to make peace and war, does not induce an authority to make treaties of a fœderal kind, *quasi fœdera*, and, whether the treaties they so make, [*304] do not put them upon *pro ea vice*, in the *same situation that sovereigns are with respect to the *fœdera* contracted between them.

If, therefore, both these propositions were true, if *actio non oritur facto fœderali* were true, and if this were an act of that kind, the question would arise how far they have pleaded themselves into that situation.

I could have wished certainly, that by some means, either true or false (for as they are a corporation, and speak without swearing, I suppose they would hardly think of confining themselves to truth), that they had been able to state expressly, the peculiar situation on which a question might arise, of the sort I have now stated (and without stating which, it is impossible it should arise); for if the East India Company has contracted with any other view than that, so as not to bring the shade of analogy over the contract, and to bring it within the principles which are supposed to govern them (to say nothing of the question, how far they would be considered to govern them), if they have not brought themselves within that, it will be impossible for me to supply the defect, and to treat the subject as if it had been brought within the only predicament, upon which one *iota* of the argument I have heard will apply.

The case, then, upon the question I have stated as between sovereigns. There are many palatine jurisdictions, which are, as to all subordinate relations, and perhaps as to making peace and war, like kingdoms. If an action had been brought, on *fœdera*, against such palatines, would, or would not, the courts have repelled it, even though it had been grounded on the rights of war? Now I think, upon that, it is a very material line of argument to consider *quâ ratione* all the courts of this country enter upon questions depending on such *fœdera*. In the first place, I do not take it to be true, as Mr. Attorney has argued it, that it is by the consent of nations: I know it is an opinion, that has been treated very elaborately, that there is an implied consent of nations, which binds nations to the decisions of the forum of each, where questions that arise upon treaties, or upon the law of nations, are decided in a court of admiralty. It seems strange to say, that this is the implication of our Court, which is a [*305] Court that arises by commission under the Great Seal, *and where the terms of the commission point very much to the coloring such

a conclusion, as that from whence there originates a fair ground of argument, that it was true, if it were, otherwise, founded in fact. But in the first place, I take it to be clear that by the law of nations, in any one of the municipal *fora* (whether it be the court of admiralty, or the court of prize, instituted by special commission, or by the ordinary distribution of power), it is a just cause of war, if their decisions are not adhered to by the other side, and that a neutral State cannot be bound, if it can state, as its grievance, unjust decisions there. (7) In the next place, it is true that idea is confirmed by act of Parliament; that the questions arise here before our prize courts, under recitals of all the acts which constitute prize courts, from the time of Queen Anne, downward; the same jurisdiction is executed in Scotland, under a court of another description; and a question having arisen, how far these prizes were controllable by the acts of Parliament regulating prizes here, it was found necessary to make another act which, without changing the form of the jurisdiction, made prizes determinable there, just as they are here, but in the nature of the suit, they begin the complaint there, just as they do here (it is saved by the statute of Union *eo nomine*), and just as they do in others; yet undoubtedly the terms of treaties govern those jurisdictions in the same manner; and if the action is brought at common law, the terms of treaties will bind the decision; for the question, where the action is to be brought, does not depend upon whether it is between natives and foreigners, or grown out of federal engagements, but where they arise: if at land, they must be determined at common law, and could not be entertained by the admiralty, for (though doubts have been entertained of it) according to my ideas, the statutes of prize do not extend the admiralty jurisdiction beyond its natural extent; and, if they can be carried beyond it (as was the opinion of a great lawyer), that does not impeach my argument.

Therefore, its being a treaty between nations, will not be conclusive; but this may possibly be distinguished, because it may be contended, that where the subjects of a neutral prince bring their suit in the admiralty court, though the decision is to be regulated by the state of relation between the two countries, as its governing principle, yet the foundation of the *action is the right of the individual; and it will not [*306] therefore come fully up to a determination, between two sovereigns, upon a *fœdus* respecting their mutual sovereignty; nor up to the point, whether the Company, not being a sovereign, but having only private property, will be in the same situation. But before I think myself obliged to go largely into such a point, and upon which I should probably wish to hear argument confined to it; and though the authorities of Vattel and Grotius, and other text-books, might not afford very apt inferences, they might go some way towards affording general principles, upon which the decision might ultimately prevail.

Now to say, here, will you enjoin? will you decree specific performance? is by no means a conclusive argument: I dislike the argument, because it stands clear of the fundamental principle upon which the question is to be decided; an argument which tends only to inconvenience cannot be admitted to any great extent, and in the absence of all fundamental principles. In the next place, it goes according to the principle I am now stating, *ex tali facto, actio non oritur*; which I consider to be the true state of the question: I do not know whether it goes very naturally, not to

(7) See the report, 1 Ves. jun. 391.

the abridgment of the general proposition, but the preventing the application of it; for it is one thing, to say you shall execute specifically, and another to say, you shall pay a debt actually contracted.

It occurred to me, whether, if the East India Company had stated an account under the agreement of 1781, and reciting they had received so many lacks of pagodas from the revenue, that they had debited him so many lacks, upon which remained a balance of so many pagodas, with or without saying they would promise to pay it; and if the Nabob were to bring an action in the court of King's Bench, or any other court of law, a plea could be invented to bar that action; whether it had been worded ever so well, it would have applied to that subject; and, more particularly, how a plea, worded as this is, would apply.

I proceed then to consider, whether the plea, as it here stands, [*307] has brought it to that point, that this was a convention *between two persons acting as sovereigns, *quasi* sovereigns, respecting the public interest represented by them.

In order to do so, they have pleaded thus:

They have stated, that by divers charters, deeds, and statutes confirming them, they have, among other things, the sole right of trading to the East Indies, they are licensed to send ships of war there, or send men or ammunition to their factories for their security and defence, to choose commanders and officers over them, to continue (which is the material part of the plea) or make peace or war with any prince or people that are not Christians, within the precincts of their trade, in all the world beyond the Cape of Good Hope, and this Nabob, they have stated to be a sovereign prince, and an infidel, in the Carnatic, within the precincts of their trade.

So far they have gone in stating his right, and their capacity of making war; this they have done with the view, that, from the power of making or continuing war, without any express grant, it will be inferred, that the crown has granted a right to make federal engagements and treaties; this they have not stated, but have left it to be inferred from the power of making war or peace.

It would have been material perhaps to this point of argument, to have averred this, because it will be an important consideration how far those federal engagements made in India will bind the country.

I suppose it is clear that, especially with the concurrence of an act of Parliament, where a power is given them by the Public, to make peace and war, the effect of a peace or war made by them, will constitute the state of peace and war between the sovereign of this country, and the sovereign prince, with whom it is made.

If the act had provided to enable them to make treaties, the same argument would probably have concluded, that the power of the country would be bound by such treaties; unless the custom of nations [*308] would apply to them, as effectually as it does to persons *having full powers. If that were to be determined upon letters or figures only, the parties bound by the signature of their plenipotentiaries, but, till ratification, it is not understood to be a plenary obligation; and therefore, in a treaty with a plenipotentiary, ratification is one of the terms contracted for; unless therefore the custom of nations would apply to a general power given in this way by charter, if they have power to treat with all sovereign princes, infidels, within the compass of their trade, those contracts would, as federal engagements, have bound the nation: but this seems not to be expressly granted to them, but left to me to infer, from their being enabled to make peace or war.

After they have qualified themselves in that manner, they say, generally, that all the agreements and transactions in the bill, were done by virtue of the powers before mentioned. I imagine, if it had rested upon that, the powers and license being of sole trading, it would be difficult to insist, that was not the power under which they attempted to justify.

After they have stated, that they were done by virtue of their powers, they proceed to the only material words of the plea; and these are, that they do respectively relate to matters transacted between them, in regard to peace and war, and the security and defence of their respective territorial possessions, without saying what was done for one occasion, and what for the other, but leaving it as equally justified, whether it was done on account of peace or war, or for the mutual security of their possessions. Now I have not heard it argued that these words do not stand distinctively, and that the reliance of the plea is not as much upon the last, as upon the first, nor that, if it had been confined to the first branch, that from the authority of making peace or war, they would have a right to consider themselves as treating federatively, where the subject-matter of the treaty was the security of their territorial possessions; which, being unqualified, may relate to a great many other dangers than those arising from infidel princes living within the precincts of their trade.

But to keep clear of this, and suppose it confined to transactions that relate to peace and war, is it possible to contend that that general phrase is sufficient to bring it up to the point, that it is a federal engagement, formed by a sovereign, concerning *the public interests of [*309] the sovereignty? Will the sum of the words extend to that? If it would not do so between sovereigns, much less between those who have a limited charter, approaching to sovereignty in no respect, but armed with peculiar powers for their own interest.

In the first part of this plea, where they offer to prove, that they stand in a situation essential to their plea, they say, by charter and acts of Parliament, they have certain powers, can this be the manner of pleading in a court of justice? must they not show *quo modo*? must they not state the powers given them by the charters? But the Attorney says, that they are confirmed by the act of Parliament. The act in its nature is a private act, and therefore would be pleaded, but I take it for granted there is a clause at the end, that it shall be a public act. Does it follow that I am to take notice of a power given by charter, and confirmed by act of Parliament, as if it was a general law of the realm? I should be glad to hear any case that would bind me in that matter. Therefore I take the plea to be in that respect informal.

But the gentlemen, in drawing the plea, have not adverted to the most material consideration, for every plea must tender issuable matter, the truth or falsehood of which may be replied to or put in issue; if it is to be decided now, here nothing is tendered upon which issue can be taken, and there is no case of a plea of this sort, where general propositions are tendered by way of plea, in order for issue to be taken upon them.

It therefore seems to me, that the plea is bad in every view. There is not sufficient alleged to bring them into the situation to which the argument would apply, and I cannot say, if they were brought into that situation (which I wish they were, because I think it an important point to be considered), I should, therefore, lean to any application, to endeavor to do it; for I cannot take notice of what one privately may think, that the

Nabob knows no more of this, than of what is passing at Vienna. I must consider this as the suit of the Nabob; and, considering it as such, it would be difficult to sever the convenient from the inconvenient; [*310] probably, a number of inconveniencies *may arise; let them be what they will, pronouncing on this record, it is impossible to allow this plea, therefore it must be Overruled. (e)

On the 30th of the present month, Mr. *Attorney-General* (on the part of the Company) moved for leave to amend the plea, or to plead anew, on account of the novelty and importance of the case; but Lord Chancellor refused the motion. (8) (f)

(8) This was because the plea had been amended before. See the Rep. 1 Ves. jun. 372, margin &c.

(e) See 4 Bro. C. C. 180; 2 Ves. jun. 56.

(f) See 1 Barbour, Ch. Pr. B. 1, c. 6, § 4, p. 127, et seq.; 1 Hoff. Ch. Pr. ch. 8, § 2, p. 226, 227; 1 Smith, Ch. Pr. (Am. ed.) 238, 239.

MAC ADAM[s] v. LOGAN. Lincoln's-Inn-Hall, 22d July.

(Reg. Lib. 1790. B. fol. 514.)

Power to the survivor of husband and wife to appoint among children, not well executed by a deed by both. (1) Where a seal is required by the power, an appointment among children without seal is bad. [As to supplying the want of due execution of such a power for favored objects, *quære*.] (2)

By settlement, subsequent to the marriage between Gilbert and Sarah M'Adam, 3000*l.*, part of the wife's fortune, were vested in trustees, the defendants, Logan and Devaynes, the interest thereof to be paid to the husband for life, after his decease, to the wife for life, if she should survive, and after the decease of the survivor, to divide the same amongst such child or children of the marriage, and in such shares and proportions as the survivor of them, the husband and wife, should by writing, under hand and seal, appoint, and in default of appointment, among all the children equally. (3)

The husband and wife during their joint lives, and having then five children, the defendant Christopher Kilby M'Adam, their eldest son, the three plaintiffs, and a son since deceased, by deed poll, signed by them, but not sealed, appointed the 3000*l.*, after the decease of the survivor, to be equally divided among their four younger children, omitting the defendant Christopher, their eldest son.

(1) Vide *Bushell v. Bushell*, 1 Scho. & Lefroy, 96, where Lord Redesdale C. referred to this case. < *Sharp v. Sharp*, 2 Barn. & Ald. 410; *Townsend v. Wilson*, 1 Barn. & Ald. 608; *Simpson v. Paul*, 2 Eden, 34; *Doe v. Tomkinson*, 2 M. & S. 165. >

(2) Vide *Sugden on Powers*, 351, and the Editor's notes on *Chapman v. Gibson*, *antea*, 229, et seq. as to supplying surrenders of copyholds.

(3) If there should be no children, &c., then there was to be a trust for the survivor of the husband and wife, his, or her, executors or administrators. — R. L.

[The words of the settlement, as they appear in the Register's book, are as follows: to the husband for life, "and in case the said S. M. should survive her said husband, then to pay the interest to her, or amongst all and every of such one or more child or children of the said S. M. by the said G. M. begotten, or to be begotten, in such parts, shares, and at such times, and with such maintenance in the mean time as the survivor of them, the said G. M. and S. M. by any deed, &c. should appoint," &c. — *Eden*.]

Sarah M'Adam died in the lifetime of her husband Gilbert, who was since dead.

And the trustees, having some doubts concerning the validity of the deed executing the power, the present bill was filed by the surviving appointees under the deed, against the trustees and their brother, Christopher Kilby M'Adam, praying that the deed-poll might be declared to be a good execution of the power, and that the trustees might pay to them the 3000*l*.

*Christopher Kilby M'Adam by his answer insisted, that the [*311] deed-poll was not a good execution of the power, inasmuch as the power could not be executed by the husband and wife during their joint lives, but the execution thereof ought to have awaited the death of one of them, and to have been made by the survivor, and also inasmuch as it ought to have been by a deed sealed as well as signed.

Mr. Mansfield, and Mr. Hood, insisted, for the plaintiffs, that this was a good execution of the power; that being by both, it was executed by the survivor, and that the sealing was such a formality as the Court would supply, this being a power coupled with an interest, *Smith v. Ashton*, Eq. Ca. Abr. 345. They observed, that it did not appear but the defendant Christopher was otherwise provided for.

Lord CHANCELLOR,—without hearing the other side, said, he thought the appointment, by the husband and wife, during their joint lives, was not a good appointment under this power, (a) and that it was indifferent whether Christopher was or was not otherwise provided for.

Upon the other point his Lordship seemed to think, that the want of a seal could not be supplied between persons having equal equities, (b) though it may against an heir-at-law (4) or remainder-man; but, being all children, it is like a naked power: (5) but he decided it upon the former point. (c)

(4) Vide *Smith v. Ashton*, 1 Ch. Ca. 263. Sed Qu. some of the reasons given, *ibid*. 264.

(5) Vide note (2), *ante*.

(a) Sugden on Powers (4th Lond. ed.), 164, ch. 3, § 2. Where property was conveyed in trust for the use of husband and wife during their joint lives, then to the survivor for life, with a power of appointment given to the survivor, it seems, that an appointment by a joint deed of the husband and wife, would not be a valid execution of the power, especially if the wife survived the husband, though possibly it might if the husband survived. *Boyce v. Waller*, 9 Dana, 482.

(b) Sugden on Powers (4th Lond. ed.) ch. 6, § 1, p. 347, et seq.; 353, 358; 1 Story, Eq. Jur. ch. 5, § 176; 2 Chance on Powers, ch. 23, § 1, p. 502, 504, 507; *Chapman v. Gibson*, *ante*, 229, and notes.

(c) This opinion on this point, as observed in Sugden, Pow. (4th Lond. ed.) 360, cannot be supported; surrender of copyhold and executions of powers in this respect go hand in hand: as to which, vide *Chapman v. Gibson*, *ante*, 229. — *Eden*.

HUNT v. HORT. Lincoln's-Inn-Hall, 23d July.

(Reg. Lib. 1790. A. fol. 524.)

Gift by will of pictures to Lady — ; absolutely void, and shall not go to the Master, or be supplied by parol evidence. (1) Bequest of all my clothes and linen whatsoever, passes body linen only.

MRS. HEWIT, by her will, gave her houses in town, and at Richmond, to her dear niece, dame Margaret Hort, and Richard Baker, her attorney, in trust to sell the same; she then gave certain pictures specifically, and the will proceeded "my other pictures to become the property of Lady (leaving a blank after Lady), my linen and clothes of all kinds, except laces, I give, with 20*l.* to — Scott" (her servant), [*312] and made her niece Harriot Hunt her residuary legatee, (whom she recommended to the care of Lady Hort,) and Lady Hort and Richard Baker, executors.

The bill was filed for an account, &c., and two questions were raised,
1st. Whether the defendant Lady Hort was entitled to the pictures?

2dly. What linen Mrs. Scott was entitled to, she claiming the table and household linen under the bequest?

Mr. *Mansfield*, and Mr. *Short*, for the plaintiff, contended, that though it was probable Lady Hort was intended to take the pictures, yet her name being omitted, could not be supplied by parol evidence; for though parol evidence had been received, where a person was named by a wrong name, yet there was no case where a blank had been supplied, *Baylis and Church v. The Attorney-General*, 2 Atk. 239, and that as to the bequest to Mrs. Scott, the word "linen" being connected with "clothes," only body linen, not table, or bed linen, could pass.

Mr. *Steele*, for Lady Hort, contended, that on the face of the will, Lady Hort was entitled; that in the opening of the will she has given every thing to dame Margaret Hort and Richard Baker in trust, then having given four pictures, specifically, she directs the others to become the property of Lady ; there cannot be a doubt, she meant Lady Hort, who is the only person of title mentioned in the will. She afterwards calls her Lady Hort, in the appointment of executors. At least, Lady Hort is entitled to a reference to the Master, to inquire who was intended, and the parol evidence of the testatrix's intention will be admissible. In *Masters v. Masters*, 1 Wms. 421, Mrs. Masters had left a legacy to Mrs. Sawyer, when there was no such person known to her, but it was alleged she meant one Mrs. Swopper; it was referred to the Master to inquire whether Mrs. Swopper was intended, and, if the Master should find she was, she was to receive her legacy.

Mr. *Mitford*, for the defendant Scott, contended, that she was entitled to all the linen of every kind; that if it had been meant [*313] to confine it to body linen, the word linen was superfluous, as that would have passed by the word clothes.

LORD CHANCELLOR, as to this point, it was clear that connecting the word linen with clothes, showed what was the intention.

As to the former point, his Lordship had more doubt whether the first

(1) See also *Baylis v. Attorney-General*, 2 Atk. 239, and 1 Roper on Leg. 144, &c. It is different where a testator either omits a Christian name, or inserts a wrong one, or uses a mere initial letter, *et similia*, if the individual intended is clear; as in *Price v. Page*, 4 Ves. 680, and *Stockdale v. Bushby*, 19 Ves. 381, and *Coop. Ca. Ch. 229*; *Abbot v. Massie*, 3 Ves. 148, &c. &c.

gift of the whole being to Lady Hort in trust, and then part of the pictures being taken out, and the remainder to become the property of — (in opposition to a trust), he could not supply Lady Hort's name, even without referring it to the Master; but upon consideration he said, he could not supply a blank by parol evidence; and that, where there is only a title given, it is the same as if it was a total blank; that by a blank added to a general legacy, no person is referred to, and, therefore, he thought it would be too much to give it, thus, to Lady Hort. (2) (a)

(2) The declaration of the Court upon this point was, "that the devise of the rest of her pictures to a lady not named in her will, is void for uncertainty; and that the same constitute a part of the general residue of the said testatrix's estate." — R. L.

(a) Wigram on Extrin. Ev. Prop. 6, pl. 121, p. 88; Prop. 7, pl. 181, p. 143; 1 Phil. Ev. (Cowen & Hill's ed.) 539, 540; Greenl. on Ev. Pt. 2, ch. 15, § 301, and notes; Miller v. Travers, 8 Bing. 244; Doe v. Chichester, 4 Dow. P. C. 65; Ram on Wills, ch. 3, p. 32, 34.

In Massachusetts it has been said, in a general way, that where a contract has been reduced to writing, and the name of the contracting party has been omitted, the omission may be supplied by extrinsic evidence. Per Parker, C. J. in Brown v. Gilman, 13 Mass. 158. See also Penniman v. Barremore, 6 Mart. Lou. R. 497.

In Abbot v. Massie, 3 Ves. 147, upon a legacy to Mrs. G., evidence was admitted; as to mistakes in the names of legatees, see Delmare v. Rebello, post, 446.

HANKEY and Others v. VERNON and Others. (1)

Lincoln's-Inn-Hall, 27th July.

(No entry.)

Bankers receive and pay money on account of a bankrupt, after notice of an act of bankruptcy; all the sums received, are so to the use of the estate, and they cannot set off the payment made, or be allowed to come in as creditors, and to claim dividend on debts paid which were owing before the act of bankruptcy. (1)

THE bill stated that the plaintiffs were bankers, and that Elizabeth Tyler employed them as such, in the way that merchants and others usually employ bankers, and being threatened with an indictment for perjury, quitted her house on Tower-hill, on the 2d or 3d May, 1785, and went abroad to France; that she afterwards returned, and carried on business as before, till the beginning of February, 1786, and continued to make use of the plaintiff's banking-house, they knowing the reason of her absence, and not suspecting that her going away could be deemed an act of bankruptcy; and between the 18th May, 1785, and March, 1786, she paid into plaintiff's shop 9616*l.* 8*s.* 9*d.*, and during the same time, plaintiffs paid in discharge of her drafts, and otherwise on account of her and her estate, 9679*l.* 5*s.* 4*d.*, which left a balance in favor of plaintiffs, of 62*l.* 16*s.* 7*d.*

The defendant Vernon, about the 9th March, 1786, sued out a commission of bankruptcy against Elizabeth Tyler, and she was found a bankrupt, upon proof of an act of bankruptcy *committed by [*314] her; and the defendants, and plaintiff Thomas Hankey, were chosen assignees.

The defendants afterwards brought an action against the plaintiffs (the plaintiff Thomas, waiving the objection of his being an assignee) for the

(1) See this case at law, 2 T. R. 113, and afterwards upon the plaintiff's obtaining an injunction in this Court, from the M. R. (in 1788) 2 Cox, 12.

sum of 9616*l.* 8*s.* 9*d.* paid by Elizabeth Tyler, into the hands of the plaintiffs after her return from abroad; and the plaintiffs pleaded the general issue, and gave a notice of set-off. The action came on to be tried at the sittings after Trinity term, 1787, and the defendants giving evidence of some of the creditors of Elizabeth Tyler, having, in her absence, in 1785, called for payment of some bills; and that she had, soon after her return, given a security to Messrs. Thackeray and Hanson (who in her absence had sued out a commission of bankruptcy against her, but had suffered the same to be superseded) for a debt, owing from her to them; and insisting, that, in point of law, all the money which had been received by plaintiffs for said Elizabeth Tyler, after her return, was to be considered as received for the use of her assignees; and that the defendants were not, at law, entitled to be allowed, by way of set-off, their payments, made by them in the course of their business as bankers; the jury found a verdict against the plaintiffs for 16,930*l.* (being the amount of all the money received by plaintiffs after Elizabeth Tyler's return, and in which the sum of 9616*l.* 8*s.* 9*d.* was included.) This verdict having been taken, by mistake, for too large a sum, was reduced to 14,865*l.* 19*s.* 5*d.* for which sum, with the costs, amounting to 15,087*l.* judgment was entered up, and the plaintiffs afterwards satisfied that judgment, without prejudice to any right which they might have, in equity, to a satisfaction out of the bankrupt's estate, in respect of such parts of the sum of 9679*l.* 5*s.* 4*d.* to which they were entitled to a satisfaction; and the defendants afterwards made a satisfaction to the plaintiffs, as to some part of that sum.

Amongst the sums amounting to 9679*l.* 5*s.* 4*d.* on account of Elizabeth Tyler, paid by plaintiffs after 2d May, 1785, and before the issuing the commission of bankruptcy, were several sums paid to persons to whom Elizabeth Tyler was indebted before the 2d May, 1785, and which debts the respective creditors would have been entitled to prove [*315] under a commission of *bankruptcy, if one had been issued in consequence of her going to France; or to have proved the same under the commission of 9th March, 1786, in case such debts had not been paid, particularly debts amounting to 2844*l.* 8*s.* 3*d.*; and dividends having been made to the amount of 7*s.* 6*d.* in the pound, the plaintiff applied to the defendants to be permitted to stand in the place of the creditors so paid, and to be paid a dividend thereupon, ratably with the other creditors: which being refused, the present bill was filed for that purpose.

The facts were admitted by the answers of the defendants, but the equity of the case was denied, by reason the payments were made by the plaintiffs after notice of Mrs. Tyler's having committed an act of bankruptcy.

Mr. *Hardinge*, Mr. *Graham*, and Mr. *Hollist*, admitted that the plaintiffs had notice of the act of bankruptcy at the time they made the payments, and that they had paid the money in their own wrong; but contended that they had, nevertheless, an equity to stand in the place of those creditors who were rightfully paid. If the plaintiffs had paid the creditors with their own money, they would have had a right to be paid the distributive share that the creditors themselves could have claimed; why should they not now be permitted to stand in their place? which is all that is prayed by this bill. It may be compared to those cases where a fund having been applied which is not liable, and there is a fund liable to the payment, restitution shall be made, by the liable fund, for the money paid.

But Lord CHANCELLOR (without hearing the other side) (2) said, that though this was a hard case, there was no such equity, the plaintiffs having notice of the act of bankruptcy, and

Dismissed the bill.

(2) "The Lord Chancellor asked the counsel for the plaintiffs whether the plaintiffs might not maintain an action for this money, which they had so paid since the bankruptcy, as being a debt become due since the bankruptcy? The plaintiffs' counsel admitting they might do so, could not maintain their argument." From Mr. Bell's MS. note.

*HOARE v. BARNES. Lincoln's-Inn-Hall, 27th July. [*316]

(No Entry.)

By marriage settlement 1000*l.* was to be laid out, to the use of the wife for life, with remainder, in case she should survive, to her; and if the husband should survive, then to such uses as the wife should appoint; in default of appointment, to such person as the same would have gone unto by the statute of distribution, in case the wife had died unmarried. She died without appointment, leaving a daughter. The father gave to the daughter a real estate in fee, in performance of the covenant. This is a case of election, but the daughter, electing to take under the will, takes the personalty as next of kin.

By settlement, 29th June, 1767, previous to the marriage of George Hoare with Amy Dewdney, father and mother to the plaintiff, to the intent that 1000*l.* part of her fortune, might be secured upon the trusts therein expressed, the said George Hoare did thereby covenant, promise, and agree, with Charles Dewdney, the father of the intended wife, that the said sum of 1000*l.* should, as soon as conveniently might be after the marriage, placed out at interest, on good securities, or be laid out in lands, in trust, that the said George Hoare should receive the interest and profits for life; and in case Amy Dewdney should survive her intended husband, in trust, that Charles Dewdney should pay the said sum of 1000*l.*, with the interest from the death of George Hoare, to the said Amy Dewdney, and if the same should be laid out in land, should convey the land to her; and if George Hoare should survive his intended wife, that Charles Dewdney, and the executors of George Hoare, should pay the said 1000*l.*, or convey the lands to be purchased therewith, unto such person or persons, and in such manner as Amy Dewdney should, notwithstanding her intended coverture, appoint, by her last will and testament, or any other writing; and in default of such appointment, then, that Charles Dewdney, and the executors of George Hoare, should pay the said 1000*l.*, to such person or persons, as the same would have gone, and been payable unto, by the statute of distributions of intestate's estates, in case the said Amy Dewdney had died sole and unmarried; or if the same should be laid out in lands, then the same to be to the use of the said Amy Dewdney, her heirs and assigns forever, and to be conveyed accordingly.

The marriage took effect, and George Hoare received a much larger sum than 1000*l.*, which he applied to his own use, and did not lay out the said 1000*l.*, or any part thereof, upon any securities, or in the purchase of lands. Charles Dewdney, the father of Amy, died in 1771; and in 1772, Amy, the wife of George Hoare, died, without making any appointment, leaving the plaintiff, her daughter, and only child by the said George Hoare, surviving her.

*George Hoare afterwards made his will, dated 26th Septem- [*317]

ber, 1783, thereby reciting the settlement, that the 1000*l.* had not been laid out, and also the death of his wife, without having made any appointment; therefore, for securing the 1000*l.* to the plaintiff, and in lieu of the performance of his covenant, he gave and devised to the defendants, all his freehold and copyhold estates, subject to an annuity of 20*l.* to his (second) wife, for life, in trust, after payment of the annuity, to pay and apply the rents and profits towards the maintenance of the plaintiff, until she should attain the age of twenty-one years, and when she should have attained twenty-one, to grant, surrender, and convey the premises to her, her heirs and assigns forever, subject to the annuity; all which premises would be worth considerably more than 1000*l.* And if the plaintiff should die under twenty-one, leaving issue, then on trust for the benefit of such issue. And, after giving certain specific and pecuniary legacies, the testator gave and bequeathed all the residue of his personal estate to the defendants, to put the same out at interest, and pay and apply the interest, and also the principal, unto and for the benefit of the plaintiff and her children, in the same manner as his trust estates were directed to go, and be paid and applied: and appointed them executors. The testator died on the 7th August, 1785.

On the 27th December, 1790, the plaintiff attained her age of twenty-one years, and applied to the executors for a conveyance of the real estate, and an account of the personal estate of her father, which they refused on account of the plaintiff's mother having made no appointment of the 1000*l.*, and having left relations of her own family, besides the plaintiff, by which means, they did not know to whom the sum of 1000*l.* belonged. Upon which the present bill was filed, by which the plaintiff prayed a conveyance of the real estate, an account of the rents and delivery of the deeds relative thereto, an account of the personal estate, and payment of the residue thereof.

The executors, by their answer, submitted, whether the 1000*l.* did not remain a debt upon the estate, for the benefit of the next of kin of Amy Dewdney, exclusive of the plaintiff; in which case, it would nearly exhaust the personal estate in their hands.

[*318] *Mr. *Mifford*, for the plaintiff, argued, that it could not be the meaning of the settlement in any case to exclude a child of the marriage; it could have intended the provision only in default of issue.

Mr. *Solicitor-General*, for the defendants, stated the doubt of the executors to be, whether the child was put to an election. According to the literal sense of the words of the settlement, Amy could not have a child; and the persons who would take, if she died sole and unmarried, were her uncle and others, who were her next of kin.

Lord CHANCELLOR said, it could not be in contemplation in a marriage settlement, that the wife should die unmarried; he therefore declared, that the plaintiff, making her election to take under the will, was entitled to the real estate, instead of the 1000*l.*, and also to the personal estate.(a)

(a) This is a mistake, though adopted by the Court; for the meaning of the words in the settlement, in case the said Amy Dewdney had died sole and unmarried, is not, as supposed, in case she had died without having ever been married; for the 1000*l.* was not to be paid by the express words of the settlement, until after marriage, and then the trusts of the settlement are very clearly expressed and sensible, if taken in the strict literal sense, and are these, viz. that, if the intended wife should survive her husband, she should have the 1000*l.*, but, if she died in his life, then it should go to such person as the wife should appoint; or if she made no appointment, then it should go to such person as it would have gone to if she

had survived the husband, that is, it should go to all her next of kin, except her husband, in the same manner as her personal estate would have done, if she had survived and died intestate; therefore the decree is clearly right and agreeable to the strict words as well as the intention of the settlement, unless, which probably was not the case, the 1000*l.*, or some part of it, was wanted to pay the legacies in the will; if that had been the case, this 1000*l.*, or so much as was wanted for legacies, ought to have gone to the legatees, and that is clearer than the determination in *Streatfield v. Streatfield*, Forr. 176: and in the present case the condition is expressed, and the next of kin are not to be more favored, with respect to the personal, than the heir with respect to the real, estate; on the whole, the words which were thought extraordinary, only import, if taken literally, that the intended husband should not have any benefit from this 1000*l.*, unless the wife appointed it to him, notwithstanding he survived her; but that it should go in the event of his surviving her, and there being no appointment, not to him, as it would if there had been no such provision, but to her posterity, if she left any, or, if she left none, then to her collateral relations, according to the statute of distribution, as if she had not died under coverture. (Serjt. Hill's MSS.) — *Eden*.

TAWNEY, Knight, v. CROWTHER. Lincoln's-Inn-Hall, 27th July.

(Reg. Lib. 1790. B. fol. 561. Entered *Tawley, &c.*)

An agreement having been made, and reduced into writing, but not signed; and letters having passed between the parties referring to the agreement, in which the defendant had said "his word should be as good as any security he could give," this takes it out of the statute of frauds, and he shall be compelled to perform the agreement. (1)

THIS cause, which came on before, upon a plea of the statute of frauds (v. ante, p. 161), now came on to a hearing, the statute being again insisted upon by the answer.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *Abbot*, for the defendant, now contended, that the letter written by the defendant had not such reference to the prior agreement, as to make it an agreement in writing, under the statute of frauds. They insisted, that the agreement was incomplete, and open to fresh terms to be proposed till Michaelmas, and that this was the meaning of the defendant when he said, "there was time enough till Michaelmas to settle everything." They cited the case of *Wedd v. Stevenson*, and that of *Stokes v. Moore*, in Mr. Cox's note on *Hawkins v. Holmes*, 1 Wms. 771 [also 1 Cox. Ca. Ch. 219], to show that unless the written agreement, coupled with the parol agreement, made one complete agreement, it would not take the case out of the statute: and that it did not sufficiently appear that Crowther, by signing the letter, meant to sign the agreement. They said, that it had been held, that letters, though signed, were not sufficient agreements *within the statute. That in the case of *Whaley v. Bagenal*, [*319] 6 Bro. Parl. Cas. 52, there was a letter under the hand of the party, but not held sufficient. So was the case of *Maxwell v. Montague*, 1 Williams, 618, which was a promise to do a future act, and held insufficient. Where there are two writings, the later, in order to operate, must be an adoption of the former. The phrase, "that his word was as

(1) Lord Redesdale C. repeatedly observed, he could never bring his mind to agree to this decision, or that of *Allan v. Bower*, ante, 149; and his Lordship observed, that Lord Thurlow himself was "so diffident of his opinion, that he gave the defendant his costs, provided he consented to deliver up possession within a certain time, that there might be no appeal." See in *Clinan v. Cooke*, 1 Scho. & Lefroy, 33, 34. In the same case, afterwards, p. 37, Lord R., speaking of *Allan v. Bower*, says: "Any person who reads his Lordship's decision in 3 Bro. will find that he did not feel himself very strong when he delivered his opinion. There was something of the same impression as was on his mind in the case of *Tawney v. Crowther*." It is important to notice that these observations, coming from such high contemporary authority, seem to impugn the force of the principal case, however adopted by the M. R. in *Forster v. Hale*. See 2 Ves. 713, note.

good as his bond," only amounts to a promise to come to Oxford, and treat further; especially as the first time it was used it followed an express refusal to sign, and must be taken the second time in the same sense. It did not amount to a promise to sign the instrument. If this case succeeds, every negotiation may be raised to a binding bargain; and the party will, in this case, be bound to a bargain he never meant to make.

Mr. Mansfield, for the plaintiffs. This is, substantially, an agreement in writing. There have been many cases where letters have been held to amount to agreements. The only use of the parol evidence is, to show what the agreement was; and then, if the paper which is signed refers to that agreement, it is enough. In this case, it is not disputed that an agreement was put into writing, and kept in *Crowther's* custody.

The cases are so loosely stated, that one cannot reason from them. In *Webb v. Stevenson*, it never amounted to a binding agreement. In *Brodie v. St. Paul*, the agreement referred to something that never was in writing, it did not appear what covenants were read. In *Whaley v. Bagenal*, the letters expressed no terms. In *Lord Montacute's* case, it was the same; but upon the whole of this case, the letter is, in effect, a promise to perform the agreement.

LORD CHANCELLOR. The question turns on two points, 1st, as it stands under the statute of frauds; 2dly, independently of the statute. And 1st, as to the statute of frauds, it is an easy question taken by itself. A good deal of ingenious argument has been made use of, to prove that the letter is insufficient to take it out of the statute of frauds. If the letter contains the terms of the agreement, or if it refers to another paper which contains the terms, that is sufficient; for I am of opinion, that if a letter [*320] refers so clearly to an agreement, as to show what was *meant by the parties, where the existence of the paper is proved by parol, that will take the case out of the statute. Then how is the fact? *Crowther* writes a letter referring to a paper in his own possession, and promises to perform; such a letter would be sufficient to draw them from the objection, that the promise is not in writing. (a) Then, independent of the statute: if a letter, *now*, will bind the party; before the statute, a parol agreement would have been binding. The question is, whether here is sufficient to raise a contract that will bind. If the letter cannot be referred to the agreement, or does not contain proper terms, I cannot treat it as out of the statute; but, I confess, on what appears here, the papers do refer to that agreement, and contain a promise to perform it: the defendant did intend, by the letter, to raise a confidence that the agreement should be performed. (His Lordship here stated the facts.) If he had meant only to treat further, it would not have taken it out of the statute, being only *ad referendum*; but no doubt he meant to refer to the agree-

(a) The doctrine upon the subject, is thus stated by Lord Eldon, in *Coles v. Trecothick*, 9 Ves. 250, though the agreement is not signed, if the letter contain all the terms and describes the consideration, and all the circumstances, so that by the contents of the letter, it can be connected and identified with the agreement; that letter, which not only is not a signature, but is the last of all things that can be called signing the agreement, is a writing signed, which, ascertaining the contents of the agreement, amounts to a note or memorandum of it, and therefore satisfies the statute. But the Court will not decree performance, unless it can be collected from a fair interpretation of the letters that they import a concluded agreement, nor if it be doubtful whether what passed was merely treaty. *Fowle v. Freeman*, 9 Ves. 315; *Rose v. Cunningham*, 11 Ves. 550; *Huddleston v. Briscoe*, ib. 591; *Stratford v. Bosworth*, 2 Ves. & Bea. 341; *Card v. Jaffray*, 2 Sch. & Lef. 384; *Ogilvy v. Foljambe*, 3 Meriv. 62. See also the cases collected, *Sugd. Vend. & Purch.* (6th Am. ed.) 123, 123, [171, 172,] and notes and cases cited; *Tanner v. Smart*, 6 Barn. & Cres. 603; 9 Dowl. & Ry. 549; *Dobell v. Hutchinson*, 3 Adol. & Ell. 371; 5 Nev. & Man. 260. }

ment, which had been reduced to writing, and which he had carried away with him. The question is, whether the writing referred to in Morrell's letter, was that which he wished to be signed: I think it was; then Crowther said, he would call on him. He admits, that on the day he thought he should be there, he would call; he does not deny it was for the purpose of signing the agreement. This, if it refers to the agreement, is sufficient; and I think it does. There is evidence, in the cause, of the parol agreement, which refers it to the head of cases where evidence is admitted of what passed by parol. It is argued, that he took time, till Michaelmas, not to complete the former, but to make a further agreement; it is true, the conveyance was to be at Michaelmas; then what are his words? "my word shall be as good as any security I could give." The signing of the paper was the security pointed to. On the whole matter, therefore, he has agreed, by writing, to sign it. Several cases have been cited, and it has been argued, that he declined to sign it. If he had said, he never would sign it, he could not have been bound; but if he said he never would sign it, but would make it as good as if he did, it would be a promise to perform it; if he said he would never sign it, because he would not hamper himself by an agreement, it would be too perverse to be admitted; but here I am of opinion, that the agreement must be performed. (2)

(2) The decree is entered as by consent of the parties. — R. L. With regard to this, see note (1), ante, and Lord Redesdale's observations, 1 Scho. & Lefroy, 33, 34, there referred to. His Lordship states this case to be ill-reported by Mr. Brown; and that the Lord Chancellor induced the parties to have the decree taken by consent, by allowing the unsuccessful party his costs; some arrangement, as to their costs, was probably made between the parties out of Court; for the decree as in R. L. does not provide for them.

*PITT v. MACKRETH.

[*321]

(Reg. Lib. 1790. B. fol. 438. b.)

(Exceptions to the Master's report of costs.)

Exceptions are not regularly taken to the Master's report for costs only, but should be by petition. (1)

Costs had been ordered, by the decree, to be paid to the plaintiff, as to so much of the bill as related to the sale, and the annuities, &c. (see the case reported, ante, vol. ii. p. 400), which excluded the costs of the defendant, Garforth.

The method by which the Master did this, was to examine how much of the proceedings related to the defendant, Garforth, which he found to

(1) Vide S. P. per Lord Eldon C.; Lucas v. Temple, 9 Ves. 299; et per Sir William Grant, M. R., in approbation of the principal case, Purcell v. McNamara, 12 Ves. 170, 171.

[In Holbeck v. Silvester, 6 Ves. 417, it was stated to be the practice, that though there cannot be an exception for costs only, yet if the party except upon any other ground, he may add an exception for costs. In Lucas v. Temple, 9 Ves. 299, however, Lord Eldon expressed his doubts of this distinction, observing, that frivolous exceptions would be taken, merely for the sake of the costs. The inference from these cases is, that where an objection is made to the taxation of costs generally, the course of practice is to except in the first instance; where the objection is to the allowance or disallowance of items, there must be a petition for leave to except, 2 Turn. & Ven. 145. See the practice alluded to in Purcell v. McNamara, 12 Ves. 170, by which, if leave were granted, it would have the effect of confirming the exception to the particular items objected to. — Eden.] { See 2 Smith, Ch. Pr. (Am. edit.) 368, 369; 2 Madd. Ch. Pr. (4th Am. edit.) 510. }

be one-sixteenth part; he then taxed the costs of the whole suit, and deducted one-sixteenth part as the costs of Garforth, and reported the remainder due from the defendant, Mackreth.

This mode of liquidation had been consented to, or at least acquiesced in, at the Master's chambers.

And now, on exceptions to the Master's report,

Lord CHANCELLOR said, an exception had never been admitted for costs only, that the regular method was to state the articles the party meant to object to in a petition, and to pray leave to except; where there is a reference as to costs of a particular part of the cause, the Master must examine what relates to that part.

But here the party having consented, at the Master's chambers, to the mode of taxation adopted as the most convenient, could not afterwards except; therefore his Lordship overruled the exception, on the merits.

There were other exceptions to sums allowed by the Master, which were also overruled.

[*322] *HALE v. COX. Lincoln's-Inn-Hall, 1st August.

(Reg. Lib. 1790. A. fol. 635.)

The testator having two estates in mortgage, orders the debt upon one to be paid out of his personal estate, and charges the other upon the mortgaged premises, and gives the residue of his personal estate to persons by whose deaths it afterwards lapses: the mortgage-debt charged upon the mortgaged premises, shall be paid out of the personality; for, though he exonerated the personal estate for the legatees, *non constat*, he meant so to do for the next of kin, and it is as if he had said nothing of his personal estate; in which case a mere gift of the mortgaged premises, subject to the mortgage, would not exempt the personality. (1)

WILLIAM HALLET, late of Wolverhampton, mortgaged certain premises, called the Milstones, to Thomas Robins, for securing the sum of 300*l*. and afterwards died, having made his will, dated 22d June, 1782, and thereby directed, that all principal money and interest, which should be due and owing from him, at the time of his decease, on a mortgage of the messuage, &c., situate in Piper's Row (other premises then in mortgage), and all other his just debts and funeral expenses, should be fully paid and discharged out of his personal estate; he gave several legacies, and then gave and bequeathed the rest and residue of his said personal estate to John Bradney, and Obadiah Parker, in trust, to cause a true inventory to be made thereof, and to protect and preserve the same in the best manner they should be capable of, for John Mintridge, until he should attain his age of twenty-one years, and then in trust, for the proper use and benefit of the said John Mintridge; but if the said John Mintridge should happen to die under the said age of twenty-one years, unmarried and without lawful issue, then in trust for Mary Mintridge, when she should attain her age of twenty-one; he then gave real estates

(1) Vide *S. P. Waring v. Ward*, 5 Vesey, 670, &c. The like was also determined in *Noel v. Lord Henley* and others, per Ch. Baron Richards, in the Court of Exchequer, 10th May, 1819; which case will be soon published in Mr. Daniel's Exch. Rep. 1 vol. It will be seen that the devise of the real estate, there, seemed to afford a most strong argument that it was to bear the burden of the charges at all events; and it was ably contended by Mr. Lovat, that the fact of lapse, and all matters relative to the personality, had nothing to do with the question. The parties, therefore, appealed to the House of Lords: which matter is still pending. Upon the principal case, &c., vide per Sir W. Grant, M. R. in *Hancox v. Abbey*, 11 Ves. 187, 188, 189.

to the same trustees, upon trust for the benefit of John and Mary Mintridge, and then gave all other his messuages undisposed of, and which included the premises in mortgage, to Robins, to the same trustees, in trust, if they should think proper, to sell and dispose of such his said messuages, &c., as should be on mortgage at the time of his decease, and, after payment of all principal moneys and interest, that shall or may be due on any such mortgage, he directed the trustees to place out the remaining part of the purchase-money at interest, on securities, and to pay the interest to his daughter Catherine Jones, for life, with remainder for the benefit of her children; he then gave his trustees discretionary powers, with respect to the mortgaged premises, if they should think proper to continue them in mortgage to the then mortgagee, or to borrow money of other persons on mortgage thereof, the rents and profits thereof, in that case (after payment of interest, &c.), to be to the same uses, with an ultimate remainder to his own right heirs, and appointed his trustees executors of the will. The testator died soon after, leaving *Catherine Jones his heir-at-law and also his next of kin; Brad- [*323] ney and Parker proved the will, but are since dead, having made some of the other defendants their executors, and Parker, surviving, left others of the defendants his heirs-at-law, in whom the legal estate in the premises devised by the will is vested.

John Mintridge and Mary Mintridge both died under twenty-one years of age, in the lifetime of Catherine Jones, who has five children, also defendants.

The executors of the mortgagee filed the present bill, praying, among other things, an account of the personal estate of the testator, and if it should appear insufficient to pay what should be found due in respect of the mortgage, that the deficiency might be raised by sale of the mortgaged premises, or other parts of testator's real estates.

Mr. *Solicitor-General* stated it as being a question among the defendants, whether the direction, with respect to the personal estate, should be, that it was liable to debts, with an exception of that charged upon the mortgaged premises given to the testator's daughter, Catherine Jones, or that gift could be considered as any more than the common case of a gift of mortgaged premises, subject to the mortgage-money, which would leave the personal estate liable.

Mr. *Campbell* (who was both for Mrs. Jones the heir-at-law, and next of kin, (2) and also for her children,) said,

A question might arise between her and the children, as, if the mortgage debt fell upon the personal estate, which, in the event, was undisposed of, and devolved upon her as next of kin, she must bear the whole; if it remained a charge upon the mortgaged estate, that was given to her for life only, and the charge would be upon the inheritance alone; but she was satisfied to take it in the way most beneficial to her family. (2)

The residue of the personal estate was given to the trustees, to preserve the same for John Mintridge, until he should attain twenty-one, and was then given to him; he died under twenty-one; so that this gift was lapsed; then it was given to Mary Mintridge, *when she [*324]

(2) The point not having been argued here, would seem to weaken the force of this as a complete determination; which is noticed by Sir W. Grant, M. R. 11 Ves. 188. His Honor, however, relies upon the strength of Lord Thurlow's opinion against exonerating the personal estate, as exemplified in the Duke of Ancester v. Mayer, ante, 1 vol. 464, &c., and Waring v. Ward, 8 Ves. 470, settled the question.

should attain twenty-one, which is like the cases of legacies given at twenty-one, and which are considered as not vested; if so, it is undisposed of, and Mrs. Jones must take it as next of kin.

LORD CHANCELLOR. In this case the testator has been very anxious to give no real estate till after the payment of the debts; he proceeds, that if it be more convenient for the family, the mortgaged estate shall not be sold, but other money borrowed upon it, to pay the mortgaged debt. Is it possible, then, to throw the debt upon the personal estate? Can it be construed that he intended it to be sold, and that so much as is more than the 30*l.* should go to the legatee; that the 300*l.* mortgage-money should be paid by the personal estate, and the 300*l.* which continues real, descend to the heir-at-law? It would be too much to attribute this intention to him. Upon the whole of the will, it seems, that he meant the personal estate should pay the other mortgage; but as to this, that it should be exonerated, for the benefit of the legatees.

But although the intent was that the legatee should take the personal estate, exempted from the mortgage debt; it does not follow that the next of kin shall take it so. The legatee's being dead, it is the same thing as if he had said nothing in his will about his personal estate. (3) It must devolve in the ordinary way, as if it stood without any expression of a desire to exempt the personal estate; and then the personal estate must be applied. (a)

(3) See *Waring v. Ward, &c.*, referred to by note (1), et per Sir W. Grant, M. R., in *Hancox v. Abbey*, 11 Ves. 187, et seq.

(a) See *Ram on Assets*, ch. 29, § 1, p. 357, 358; *Pickering v. Lord Stamford*, 4 Bro. C. C. 214; 2 Ves. jun. 272, 581; 3 Ves. jun. 332, 492.

MARTIN v. WILSON. Lincoln's-Inn-Hall, 1st. August.

(Reg. Lib. 1790. B. fol. 615. b.)

Gift of a share over, to the children of my late cousins W. U. and J. U., share and share alike, at their respective ages of twenty-one: this is a tenancy in common among those then living: and one of them dying in the lifetime of testator, that share is lapsed. (1)

THE testator made his will 19th May, 1777, and thereby gave his real and personal property in eight parts to eight cousins and their issue: with respect to five of the shares, he made the following provision; in case the said Elizabeth Underwood, Mary Underwood, (2) Robert Underwood, Thomas Underwood, and Elizabeth Berrick, or either of them, should die without leaving issue, then I give and bequeath the part [*325] or *share of him, her, or them, so dying without issue, of and in the said principal money, which his, her, or their respective child or children, if they had had any, would have been entitled to, unto the children of my late cousins, William Underwood and John Underwood,

(1) Although this decision was followed by Lord Loughborough [see the Editor's next note], it seems to contradict several of the authorities. { See them collected in a note to *Andrews v. Partington*, post, 401. } See the Editor's notes and observations in *Armstrong v. Eldridge*, ante, 216, and in *Viner v. Francis*, ante, 2 vol. 658, &c. It is observable, that "*Viner v. Francis* was not cited in the principal case." — From Lord Redesdale's notes.

(2) "This Mary Underwood married one George Fair; upon her death, without issue, Lord Loughborough C. was of the same opinion, 3d August. 1795; *Mitford v. Wicker* was cited; *Viner v. Francis* was not." — From Lord Redesdale's MS. notes.

equally, share and share alike, to be paid to them at their respective ages of twenty-one years, and the interest thereof, to be applied in the mean time, at the discretion of my executors, for their maintenance and education.

Upon this cause coming on before, for further directions, it had been declared, that Elizabeth Underwood ought to be considered as having died in the lifetime of the testator. At the time of the making of the will, William Underwood had one child, a daughter, named Sophia, who afterwards died in the lifetime of the testator. John Underwood also had one daughter at the time of making the will, Harriet, the wife of the defendant Wilson, who survived the testator, and was his heiress-at-law, but who had died since his decease, and her husband, the defendant, had taken out administration to her.

The cause came on now for further directions, and the question was, who was entitled to the funds, in Court, to which Elizabeth Underwood would have been entitled had she been living at the death of the testator.

Mr. *Solicitor-General*, for the defendant Wilson, contended that Harriet, his late wife, as survivor, would take the whole. The gift was to the children of his cousins, and would have admitted any children of Elizabeth Underwood, who should have been born before the death of the testator, or before her death, if she had survived him; therefore it did not vest till the death of the survivor of the testator, or Elizabeth Underwood; and there being at the death of the testator (who survived) but one child living of John, and no child of William, it must vest in that only child of John.

Mr. *Mitford*, for the plaintiff, contended, (3) that the words "children of his cousins William Underwood and John Underwood," must mean those who were so at the time of making the will, and that it was the same as if he had named them Harriet and Sophia Underwood. That, in this case, no survivorship was given between them; therefore Harriet, as survivor, could only *take a moiety, and the other [*326] moiety (of so much as was personalty) would be undisposed of.

And Lord Chancellor was of opinion, that this was a tenancy in common from the making of the will; (a) and that so much as was the produce of the real estate, vested in Harriet, as heir-at-law of the testator; and the moiety of that which was produced by the personalty goes to the personal representative of the testator. (4) (b)

(3) "*Viner v. Francis*, ante, 2 vol. 668, was not cited. See *Bateman v. Roach*, 9 Mod. 104." — Lord R.'s note.

(4) Vide note (2), ante.

(a) See *Armstrong v. Eldridge*, ante, 215, and note (a); *Drayton v. Drayton*, 1 Desaus. 329; *Bunch v. Hurst*, 3 Desaus. 288; *Westcott v. Cady*, 5 John. Ch. 334; *Viner v. Francis*, 2 Bro. C. C. 688, and cases cited in the notes.

(b) In reference to the lapsing of the share, see *Davis v. Taul*, 6 Dana, 52; *Comfort v. Mather*, 2 Watts & S. 450; *Maybank v. Brooks*, 1 Bro. C. C. 85, note (b), and cases cited; *Ballard v. Ballard*, 18 Pick. 41; *Frazier v. Frazier*, 2 Leigh, 642.

WRIGHT v. NUTT and Another.

[Vide etiam S. C. 1 H. Bl. 136.] Lincoln's-Inn-Hall, 3d August.

(1)

The plaintiff's testator's property in America being confiscated, subject to his debts, a creditor there, ought first to apply to make that property available to payment of his debt, before he sues him personally here. (2)

THE case made by the bill was as follows:

"That Sir James Wright, deceased, was for many years before, and in the year 1774, and from thence to the acknowledgment of the independence of the United States of America, governor of the then province of Georgia, in North America, and constantly resided there till the troubles in that country commenced; in the course of which residence he acquired very considerable property in the said province, consisting of plantations, negroes, cattle, and other effects on his said plantations: that, in the course of managing and cultivating the said plantation, Sir James Wright purchased of Miles Brewton, of South Carolina, certain negro slaves, at the price of 880*l.* 5*s.* current money of South Carolina, being of the value of 1300*l.* sterling, or thereabouts, for which he gave the said Miles Brewton his promissory note, payable at a future day.

"That the disturbances in America having soon after commenced, and the persons who opposed the British authority having assumed to themselves the government of the said province of Georgia, Sir James Wright, and the other persons who remained loyal to Great Britain were obliged to fly from the said province; that Sir James Wright left behind him the whole of his property, to a considerable amount; and, amongst the rest, the several slaves which he had purchased as aforesaid; that the persons

(1) Cause ordered to stand over — (R. L. 1790, B. fol. 653, b.) And vide postea, 340, and the next note.

(2) It is most material to observe, that Lord Eldon C., upon the most mature consideration, dissented from Lord Thurlow, Lord Kenyon, and Lord Loughborough; holding, that a creditor, who had expressly contracted for the benefit of two different securities, ought not to be deprived of either of them upon any such grounds; and that neither in the present instance, nor in the case before him, were there any clear means of the party making his claim effectual against the funds abroad. It is evident, that his Lordship departed from the principle of depriving a creditor of his double remedies in any general case whatever. See Lord Eldon's most elaborate judgment in the similar case of *Wright v. Simpson*, 6 Ves. 726 - 738, throughout. The case from p. 714, comprises most of the authorities; and Lord Eldon expressed (*ibid.* p. 735) a just and due satisfaction that his own difference of opinion was fortified by the ancient and unshaken authority of *Holditch v. Mist* (1 P. W. 695), "which was directly in point."

It is to be noticed, that when the principal case came on, finally, before the Court, Lord Thurlow ordered the money to be paid over to Nutt, upon his giving security to refund it, if the decree should be against him. Lord Eldon C., observes upon this, that "if Lord Thurlow's doctrine was correct, there seemed no ground for security; which was pressing it beyond the principle." Vide 6 Ves. 719 - 731. Lord Eldon's reasoning is so very convincing, that it seems to supersede the force of the other decisions alluded to. The Editor is in possession of two short MS. notes of part of Lord Eldon's judgment in *Wright v. Simpson*, omitted by the report in 6 Ves., which it may be satisfactory to subjoin. The first is referable to that part of page 732, where his Lordship supposes the creditor to have stipulated that he should not be implicated in the justice of the State [or any possible civil troubles], but should have a mere personal contract. The MS. note adds: "It was very natural so to have done at that time; neither law nor equity forbade it; and we may reasonably presume, that Smith died with the idea of his representatives having a good personal security at all events."

The next addition is towards the bottom of page 736, after the part where Lord Eldon observes, that "one of the executors appears to have been friendly to this country, the other adverse," the MS. note proceeds thus: "Is there not a reasonable ground to believe, that the Commissioners of Confiscated Estates would, upon this ground alone, have somewhat more than hesitated to have allowed the claim if it had been made?" — Editor.

who, on that occasion, assumed the government, and established themselves in the province of Georgia, in the month *of March, [*327] 1776, passed an act of assembly in the State of Georgia, entitled, 'An act for attainting such persons as are therein mentioned of high treason, and for confiscating their estates, both real and personal, to the use of that State, for establishing boards of commissioners for the sale of such estates, and for other purposes therein mentioned;' and it was thereby enacted, that Sir James Wright, and 115 other persons should be attainted, and adjudged guilty of high treason, and should be liable to the several penalties therein mentioned; and that all the land and heritages, debts, goods, and chattels whatsoever, of such persons within that State, should, according to the several estates and interests which the persons so attainted had therein, be deemed, and were thereby enacted, and declared to be, in the real and actual possession of the government thereof, without any office of inquisition; and to the end, that all the estates of the persons thereby attainted, and the incumbrances thereon, might be the better discovered and ascertained, and that the same might be applied to the uses of the State; it was enacted, that five persons should be appointed in manner therein mentioned, to act as a board of commissioners, for each county within the said State, who were to sell all the real and personal estate of the several persons named in the said act, and the moneys arising by such sales were to be paid into the treasury of the said State, and that all persons having any demands on the forfeited estates, were to lay their claims before the board of commissioners; and after liquidating all such claims on the said forfeited estates, the said board of commissioners was to empower the sheriff of the county, or any persons they might appoint, to sell the estates of the attainted persons, both real and personal, after giving thirty days, at least, public notice; and then to sell by public auction, for the money of that State only, and to the inhabitants being actual citizens, and residents of and within the same; and the persons having any claims or demands on the estates of the attainted persons, were to make the same before the expiration of 60 days after the passing of that act, or to lose their claims: that possession of all the effects of Sir James Wright was taken under, and by authority, of the said act; that Miles Brewton, being a citizen or inhabitant of the said province of South Carolina, and a friend to the United States of America, and inimical to the government of Great Britain, became entitled to claim, and to be paid out of the confiscated estates and property of Sir James Wright, the money due to him *upon the said promissory note, and that he [*328] actually made some claim in respect thereof; but before anything had been done towards liquidating the same, and in or about the month of December, 1778, possession was taken of the said province of Georgia by the king's troops, and the province was reduced under the British government; whereupon Sir James Wright was ordered to return to the said province, and resume his government there, which he accordingly did: that upon his return to the said province, he regained possession of his plantations and hereditaments within the said State, but some parts of his property upon the said plantations, had been sold under the authority of the said act of assembly; that Sir James Wright continued in possession of his government, until the month of June, 1782, during which he continued to cultivate, and greatly improved, his said plantation; that his majesty's troops evacuated the said province of Georgia, in the month of July, 1782; and in consequence thereof, Sir James Wright, and the other persons, who had adhered to the British interest in the said province, were again com-

pelled to fly from it, and leave all their landed property and most of their effects: that some time before the evacuation of the province, the inhabitants in the American interest, declared the province of Georgia to be an independent State, and chose from time to time an house of assembly of their own, as the legislative body for the said State, and, by an act passed by the House of Assembly, on the 4th of May, 1781, entitled, 'An act for inflicting penalties on, and confiscating the estate of such persons, as are therein declared guilty of treason, and for other purposes therein mentioned; reciting the former act, and that it was necessary to carry the same into full execution,' it was enacted, That Sir James Wright, and many other persons therein named, should be and were thereby banished from that State forever, and if they returned to that State, should be guilty of felony without benefit of clergy; and that all the estates both real and personal, of all the said persons, with all the debts, dues, and demands, whatsoever, due to them should be confiscated to the use and benefit of that State; and the moneys to arise from the sales which should take place by virtue and in pursuance of that act, should be applied to such uses as that legislature should direct; and that all debts, dues, and demands, due or owing to merchants, or others residing in Great Britain, were thereby sequestered, and the commissioners appointed by the said act were thereby empowered to recover, receive, and deposit [*329] *the same in the treasury of the said State, in the same manner as debts confiscated, there to remain for the use of the said State; and reciting, that there were several just claims and demands, which might be made by the good and faithful citizens of that State, and others of the United States of America, against the estates confiscated by that act; it was enacted, that any persons well affected to the independence of the United States, having debts owing to them, from the persons named in that act, or who had any just claim in law or equity, against any of such confiscated estates, should bring his claim or enter his action, within the space of twelve months from passing of that act, and in default thereof, every such person shall be forever debarred from deriving any benefit from the same; that the act then proceeded to direct the mode in which such creditors were to proceed, at their option, either by claim before the commissioners, to the end that the legislature might direct, with respect to such creditors, what to justice should appertain, or by action at law; in which case, the sum recovered by verdict, was to be paid by a certificate to be issued by the governor, or commander-in-chief; which certificate was to be taken in payment for any purchase made, at the sales of the confiscated estates; that by other acts of the said State of Georgia, and of the General Congress, the said James Wright was rendered incapable of suing any person in Georgia, or any other of the United States; that under the acts of confiscation, the American government of the State of Georgia, seized and took possession of all the effects of Sir James Wright, to the amount of 80,000*l.* which were sold for the use of the State; that some time before the month of June, 1782, the said Miles Brewton made his will, and thereby appointed Charles Pinkney and others executors; that the said Charles Pinkney soon afterwards died, having made a will, and thereby appointed his son Charles Pinkney, of South Carolina, and a member of the American Congress, and others, executors; that the said Miles Brewton, in his lifetime, or his executors after his death, not having (as was alleged) got any satisfaction under the first mentioned act of assembly, for the said promissory note of 880*l.* 5*s.* out of the estate and effects of Sir James Wright, confiscated under that act, the said Charles

Pinkney, the son, as personal representative of Miles Brewton, made a claim of the said sum of 8802*l.* 5*s.* with interest, under the authority of the last-mentioned act, against the estate and effects of Sir James Wright, confiscated thereby, and procured himself to be admitted creditor for the same; that the defendant Joseph *Nutt, acted as attorney [*330] for the said Charles Pinkney, under a power of attorney for that purpose, and afterwards obtained letters of administration from the prerogative court of Canterbury, of the goods and chattels of Miles Brewton, limited until his original will should be brought in; and in that character commenced an action at law against Sir James Wright, upon the said promissory note, and got judgment in such action by default, and proceeded to execute a writ of inquiry of damages, but before the said Joseph Nutt entered up final judgment in the said action, that is to say, on the 19th day of November, 1785, Sir James Wright died, having made his will, and appointed the plaintiffs executors thereof; that thereupon the said Joseph Nutt proceeded to revive the said action against the plaintiffs, by *scire facias*, to which the plaintiffs pleaded, and the said Joseph Nutt replied, and issue was taken thereupon; the cause was tried on the 4th day of July, 1786, and that the said Joseph Nutt recovered a verdict against the plaintiffs. The bill then proceeded to charge several facts to show, that if Miles Brewton, or the said Charles Pinkney, had not obtained satisfaction for the said debt, out of the confiscated effects of Sir James Wright, in Georgia, it was by their wilful default, that they had not obtained such satisfaction: and the said Charles Pinkney ought to resort to that fund, more especially as Sir James Wright in his lifetime, was, and the plaintiffs since his death, were, totally unable to recover any of such confiscated effects; the bill therefore prayed, that the defendants Joseph Nutt and Charles Pinkney might deliver up the said promissory note, to be cancelled, or discharge the plaintiffs from payment of the contents thereof, as not being liable in equity under the circumstances of this case, to the payment thereof: but in case the Court should be of opinion that the plaintiffs were still liable in equity to payment of any part of the contents of such note, then, that it might be decreed, that the said defendants, or the said defendant Charles Pinkney, ought in the first place to seek satisfaction for the contents of the said note, out of the confiscated estates and effects of the said Sir James Wright; and that the plaintiffs might answer only so much thereof, as could not then be, or could not before have been obtained, out of such confiscated estates and effects, and that an account might be taken for that purpose, and the note be delivered up upon payment of what should appear coming on that account, and that an injunction might issue in the mean time.

*To this bill, the defendant Joseph Nutt put in his answer; [*331] thereby admitted the several acts of assembly, and proceedings towards the confiscation of the estates and effects of Sir James Wright, in Georgia, and then stated, that the said Charles Pinkney, the younger, claiming to be the personal representative of the said Miles Brewton, made a claim of the said sum of 8802*l.* 5*s.* South Carolina currency, with interest under the authority of the last-mentioned act of assembly, against the estates and effects of Sir James Wright, which were seized and confiscated under the authority of the said act, but that he did not, as was believed, procure himself to be admitted a creditor of the said Sir James Wright, or upon his said estate and effects, or obtain any order for the payment of the said 8802*l.* 5*s.* currency, or had obtained any satisfaction whatsoever, for the same or any part thereof; but, on the contrary, that

such claim of the said Charles Pinkney was rejected by the commissioners of claims against confiscated estates, and that the commissioners entered minutes of their refusing such claim, in their books in the following words: "At a board of commissioners of claims against the confiscated estates, held at Savannah, in the State of Georgia, on the 19th day of December, 1783, present, the Honorable Brigadier-General M^cIntosh, president; the board having taken into their consideration an account preferred by Charles Pinkney, Esq., one of the executors of Miles Brewton, Esq. deceased, by his attorney James Mossman, against the estates of Sir James Wright, for 13,200*l.* South Carolina currency, and also an account against the estates of John Graham, &c. are of opinion, that as the late Charles Pinkney became a British subject, and resided with them above two years while the British courts and laws were open in this State, the accounts due some years before the Revolution, and the persons against whom they are brought, able to pay them, those accounts appear in their consequence of too important a nature for this board to determine upon, and therefore they must refer them to the legislature, and especially as it appears, the delay can be no injury to the claimant, who acknowledges he may not be sufficiently informed yet, of the true state of some of the accounts, and therefore this board cannot think themselves at liberty to make any provision for the same." He admitted that he and Robert Norris, of London, were the joint and several attorneys of the said Charles Pinkney, and that they acted for him, under a [*332] power of attorney, dated the 26th day of May, 1784, whereby the said Charles Pinkney constituted the defendant, and the said Robert Norris, his attorneys jointly and severally for him, and in his name and to and for the proper use and benefit of the said Miles Brewton's estates, to sue for, and recover from the said Sir James Wright, all such sum and sums of money, as were due and owing from him, to the estate of the said Miles Brewton: that he had obtained such letters of administration of the goods and credits of the said Miles Brewton as in the said bill mentioned, but that he had obtained the same as being necessary to enable him to recover the said demand against the said Sir James Wright, for the benefit of the estate of the said Miles Brewton, and apply the money made payable thereby in discharge of a debt, due from such estates of the said Miles Brewton to him the defendant; and that when the said Charles Pinkney remitted the said promissory note to the defendant, he directed the defendant to obtain payment thereof from Sir James Wright, and to retain thereout, in respect of the debt due, from the estate of the said Miles Brewton to the defendant, the sum of 1400*l.* sterling: that in October, 1784, he applied to Sir James Wright for payment of the money due on the said note, amounting to 13,263*l.* 2*s.* 9*d.* currency, or 1894*l.* 14*s.* 8*d.* sterling; that in the course of three following months, he had several conferences with the said Sir James Wright, on the subject of the said demand, who did not deny the same to be justly due, but requested to have time to advise with his friends on the subject of the said debt, concerning which he informed the defendant, he intended to apply to Parliament for relief; and that the defendant accordingly indulged Sir James Wright with time, until the 9th of January, 1785, when the defendant received a letter from Sir James Wright of that date, wherein he informed the defendant, that after having maturely considered the subject, he had resolved on applying to Parliament, and if the defendant thought proper, he might commence an action against him for the recovery of the same: that the defendant, as administrator of Miles

Brewton, accordingly commenced an action against Sir James Wright, in April, 1785, to which in June following, Sir James Wright pleaded a sham plea, but in the month of November, 1785, the defendant obtained judgment in the action for 1932*l.* 6*s.* 2*d.* sterling; that then Sir James Wright died; and proceedings being commenced to revive the judgment against the *plaintiffs as his executors, to which they [*333] pleaded, the cause came on to be tried, and the defendant recovered a verdict, and judgment was entered on the 19th day of July, 1786; that then the plaintiffs brought a writ of error, which was ordered to be non-prossed, it appearing that, on the defendant's agreeing not to proceed by original in the action against Sir James Wright, his attorney had undertaken to bring no writ of error; after which the defendant applied to the plaintiffs to know whether they would pay the debt; and, on their refusal, commenced an action on the said judgment, which action was still depending. He admitted that the confiscated property of Sir James Wright had been sold, and that, by the act of the assembly of Georgia, directions had been given for applying the produce, in the first place, in payment of such debts as should be proved against such effects, to the satisfaction of the commissioners; but he did not know of any steps taken towards proving this particular debt, subsequent to the before-mentioned entry of the board of commissioners. He admitted that Charles Pinkney was a member of the American Congress, but insisted that he ought, notwithstanding, to be at liberty to resort to the plaintiffs, as executors of Sir James Wright, for payment of the debt, more especially as Sir James Wright, in his lifetime, received considerable sums of money from the British government, in part satisfaction for the loss which he sustained by the confiscation of his property in America.

After the coming in of this answer, a motion was made, 23d January, 1788, for an injunction, which, after a long argument (which is reported in Hen. Blackstone's Rep. Com. Pleas, 136), was granted.

Afterwards, the defendant Pinkney put in an answer, in which he stated his application to the commissioners, and the minutes of the board, as the same appears in the answer of the defendant Nutt, and that he considered the same as a total rejection of his claim upon Sir James Wright's estates, although the commissioners did not think proper to declare the same; for which reason he did not make any application to the legislature, he being well assured and convinced, that such application would not have been attended with any success; and that, upon inquiry of the best-informed officers of the government, he had received assurances, that no provision would ever be made for this claim; *and that, upon such claims as had been admitted on the confiscated estates, no equivalent payment ever had been, or probably ever would be made, from the dissipated state of their funds; and that defendant had made application to the auditor for claims against confiscated estates in the said State, who sent him a certificate of the said minutes, and also another certificate, by which he certified, that he had never settled the above-mentioned or any other claim of Miles Brewton's executors, against Sir James Wright's estate, and also that no provision had been made by the legislature for settling the same, and for the reasons assigned by the commissioners, as before stated, no provision can or will be made for it by the State of Georgia; and the defendant further said, that it was always out of the power of the representative of the said Miles Brewton, to obtain payment of the said note from the State of Georgia. He admitted that his father was a member of the provincial Con-

gress, in opposition to the government of Great Britain, and in several other offices in the American government, and was openly and avowedly in opposition to the British government. He further said, that his father and himself, as citizens of Carolina, or himself as a member of Congress, could not avail themselves of any fund provided by the State of Georgia for payment of this demand, any more than the subjects of any other State in amity with Georgia, the States being perfectly distinct, and that he had used all methods in his power to no effect. The other facts stated in this answer, were much the same with those in the answer of the defendant Nutt. This answer was not replied to.

Mr. Attorney-General, Mr. Hardinge, Mr. Graham, and Mr. Richards, for the plaintiffs. The equity of this case is, that Sir James Wright has had all his property in Georgia confiscated, was himself a banished man, and that the fund to which the creditors should resort, is that confiscated property in the hands of the State of Georgia.

In order to enable the executors of Brewton to sue Sir James Wright, personally, they should show, that they have exhausted every method in their power, to recover against his estate. Upon the application of Pinkney to the commissioners, they refused the claim, as the executor, [*335] Charles Pinkney the elder, had *become a British subject; but this determination was not absolute, that he ought not ultimately to recover; they only referred him to the legislature, to which he never applied, because he says, it would have proved useless if he had; but he did not avail himself of the other method he had in his power. He could have gone to a jury, and obtained a certificate, and if he takes on himself to forbear taking these steps, he cannot come upon Sir James Wright personally; and his executors have a right to have the injunction continued. The equity of the case is very simple, that the person who has access to a fund for the payment of his debt, to which the debtor has not access, shall make it available before he comes upon the debtor personally. It is against natural justice in the creditor to say, you shall lose your pledge, and you shall pay me the money, because I will not have recourse to the pledge. And natural justice also requires, that the proof shall rest upon the creditor, because none but he can know whether he has applied to the proper fund or not. The Confiscation Act pointed out the methods in which creditors were to proceed against the confiscated estates, and by omitting to follow which, the creditor loses his remedy. When the commissioners refused redress, Pinkney should have applied to the legislature; if they did not relieve him, he should have brought an action against the commissioners. Not having pursued those measures, he cannot sue here. It comes on precisely upon the same ground it did before, and upon which your Lordship ordered the injunction. In *Folliot v. Ogden*, 1 Blackst. Rep. Com. Pleas, 123, they were both loyalists; Lord Loughborough there approved of what your Lordship had done in the former stage of this cause, and agreed that where the first fund is fraudulently not resorted to, that would be a good ground of equity. In this case, there is no doubt recourse might have been had to the first fund. Charles Pinkney is a leading man in the assembly; and his not obtaining a remedy, was a collusion with the State. With respect to precedents; the peculiarity of this case takes it out of precedents. It was compared to the case of *Houlditch v. Mist*, 1 Pr. Wms. 695, but that case does not apply. In *Arnold v. Holker*, in the Exchequer, it appeared that Holker had obtained a certificate; a great part of the argument turned on his having used due diligence, and he was ordered in the first place to make

his certificate available. It is not an easy thing to compare this to any other case. It does not *resemble the case of bankruptcy [*336] or insolvency, because there the party is discharged; but suppose a party to die, indebted by mortgage and simple contract, the Court, on behalf of the simple contract creditors, might compel the mortgagee to abide by his mortgage, if sufficient. It is said, that where a man has two securities, he may avail himself of either; but in the ordinary case, where that is true, the debtor is master of all the funds, and, therefore, there is no justice in his telling the creditor that he shall abide by one of them. Here Sir James Wright was no longer master of the fund in Georgia, and the debtor not being master of both funds, Pinkney may be paid out of that fund; and it would be impossible to recover back anything he may have been paid.

Mr. *Solicitor-General*, Mr. *Mansfield*, Mr. *Stanley*, and Mr. *Steel*, for the defendants. The bill admits, by its principle, that there is no ground, at law, to say that the debt is destroyed; then there must be some ground of equity upon which they call upon this Court to dissolve the debt, and this is, that by the Confiscation Acts in America, Sir James Wright's property is confiscated, liable to his debts due to good and faithful citizens of the State, such of whom as had claims were to bring actions within twelve months, and that the acts contain certain methods of proceeding, but except the claims of persons unfriendly to American freedom. And the bill states, that the creditor Pinkney was well affected to America, and that defendant Nutt was a limited administrator and creditor of Pinkney.

The question, is, whether supposing them to be well affected to America, they were bound to apply to the State of Georgia for a proportion of this property. We do not admit that Brewton was himself such a creditor as could apply to the State; and if he could not, it was not likely his executors should. What they maintain is, that the character of the defendants obliged them to resort to the State; and that Sir James Wright, though able to pay a creditor, who treated with him on the ground of a personal contract, has a right to compel him to resort to that fund, and to reduce him to the delay necessary to bring that fund to effect.

*If this equity can be maintained, it must be so, though no [*337] more had been confiscated than was sufficient to discharge the debt; and if that fund was ten pounds less than the debt, that the creditor be paid the debt *minus* ten pounds; and that, too, where the creditor treated for a personal contract.

There are no cases in this Court, except those in which diligence is by their nature required, in which the creditor has been answerable for neglect. If he takes a bill of exchange, he must, from the nature of the instrument, use diligence; but if he takes a mortgage, the Court has never called upon him for diligence, but he may, notwithstanding any neglect on his part, sue at law, returning the securities.

The case in *Peere Williams (Holditch v. Mist)* appears to apply to this case: the Lord Chancellor, there, thought the creditor ought not to be restrained from proceeding. What is the case of a bankrupt? The law never supposes that, because a man's property is taken away from him, he is discharged from paying his debts; notwithstanding that, you may sue him: the certificate would be no discharge, but that an act of Parliament has said it shall. What is the case of a person attainted? He may be taken in execution, yet he can have no property; and the

reason is, because a man undertakes in all cases to pay. There is no case where a surety has endeavored to compel the creditor to sue the principal. We deny that, in this case, there is a fund that can be made available to pay this demand; they should have proved that the fund is larger than the debt. The injunction, in this case, went on the ground that Pinkney's answer was not come in. *Arnold v. Holker* went no further than this, that Holker, having property of the debtor in his hands, it should be seen what could be made of it, and that Arnold should pay the rest and costs. As to not being able to put the fund in Sir James Wright's possession, it is sufficient that the contract was for prompt payment, no change in Sir James Wright's circumstances can make any difference. Sir James Wright's executors having sufficient assets to pay this demand, they might as well refuse payment on any other ground as that they set up. Suppose the case such, that, if Sir James Wright was sent to jail, it would be total ruin to him; the Court could not, on that ground, restrain the creditor. Here was no agreement to take the remedy [*338] out of any specific part of the *property. Supposing these persons were not such as could apply to the State of Georgia, or had not opportunity, what would be the case then? And in fact Brewton, though at first he was an enemy to the taxation of America, was really a friend to this country, and was coming hither to settle with his family, but they were lost at sea. This is an attempt to compel his executors to apply to the State of Georgia, to take this sum under such terms as they shall choose to impose. Mr. Hardinge said that the Confiscation Act required the creditor to apply to the State for this debt, but there is no such term as *require* in the act. If this be so, the case wants some contract at law, by which the creditor is to be deprived of his right of suing in such way as he thinks proper. What are the acts of confiscation as to Sir James Wright? Acts of injustice, depriving a debtor of his property; but that still cannot affect the rights of creditors. The fund provided in America is called a pledge: if it be considered so, it is decisive for the defendants. There is no case where a creditor, having a pledge, is bound to make the most of it, before he can proceed personally against the debtor, unless he is bound to do so by contract, or by the nature of the pledge. We know very little of this pledge, but that the certificates are to be paid at seven years' distance. Therefore, according to this argument, nothing is to be paid on this demand till the expiration of seven years. The equity, in this case, if admitted, would be very uncertain, as it might depend on the compensation Sir James received from this country; for, if his losses were compensated, ought he not to pay his debts arising from personal contracts? If there had been any ground to contend that the fund in America was the primary fund in this case, it might have been used at a defence at law. The question, which was the primary fund, is a question at law. In the case of *Kempe v. Antill* (ante, vol. ii. p. 11), an injunction was refused to stay an action on a bond, on the ground that the debtor's estate was confiscated in America.

Mr. Attorney-General, in reply. It is contended that Brewton, the original creditor, had not an opportunity of applying under the confiscation acts, and that Pinkney was in the same predicament, not being friendly to America. As to the first, we have it in proof, that Brewton was a member of the first Congress; and both Pinkney and his son, [*339] the present defendant, *were friendly and took part with America.

It is contended, that the original contract was a mere personal contract of Sir James Wright. But, in a variety of cases, it happens

that circumstances vary the nature of contracts. The natives were the only persons who could have benefit under the confiscation acts: no foreigners could have any benefit, especially Sir James Wright, who was banished; the confiscated estate, therefore, partakes of the nature of a pledge, in the power of the creditor; and if a man has a pledge, and does not mean to avail himself of it, he must give it up: if it happens that he cannot give it up, he is in the situation of a person who wishes to avail himself of both remedies. Here Pinkney did avail himself of these effects. It is objected, there was no requisition to Pinkney to avail himself of the pledge; but that is done away by his having, in fact, betaken himself to it, and only having deserted it from the fear that it would not be available. It is objected, that there is no principle, that if a man has lost all his property in one country, that he shall not be pursued on a transitive contract in another country; or that his being deprived of property should be no reason for his not being liable to his contracts; but our own acts of Parliament, as to bankrupts, show this has been thought to be consistent with natural justice. So, in the case of attainder, if the act of attainder provided for the payment of the debts of the person attainted, it would be a parallel case; and, in that case, I should contend that the creditor must first apply under the act, before he could personally sue the debtor. In the present case, there was property sufficient in America to pay the debt. We do not charge the defendant, Pinkney, with any collusion with the State of Georgia: but object, that he did not follow up his application there as he ought to have done, before he could come personally on Sir James Wright.

LORD CHANCELLOR said, he was still of the same opinion as he was before as to the equity in general; for, if a creditor here had a fund in a public treasure provided for payment of his debt, and would, notwithstanding, pursue the debtor personally, it would be the most unconscientious case possible. (3) (a)

(3) See, however, *Holditch v. Mist*, 1 P. W. 695, and Lord Eldon C.'s convincing arguments to the contrary, in *Wright v. Simpson*, 6 Ves. 726, 727, et seq. 730, 731, 732, &c., and note (2), *antea*, 326.

(a) See *Eden on Injunct.* (2d edit.) 62; *Kempe v. Antill*, 2 Bro. C. C. 11; *Peters v. Erving*, 3 Bro. C. C. 54; *Folliot v. Ogden*, 1 H. B. 123, and in *Error*, 3 T. R. 726; 4 Bro. P. C. Ed. Toml. 111; *Dudley v. Folliot*, ib. 714; *Wright v. Simpson*, 6 Ves. 714.

[In several of the above cases, Lord Thurlow, Lord Kenyon, and Lord Loughborough (the last extra judicially), expressed a decided opinion in favor of the relief prayed by the bill; upon the principle, that if a case were made by which it appears, that there is in the hands of the creditor, either possession of the estate in fact, or the clear means of effecting that possession, he ought to be called on so to do, or at least the Court should interpose; the creditor not having the power of assigning to the debtor those means which he had of affecting the property. In the last of the above-cited cases, the bill was the same as in the present, and it was also against creditors of Sir J. Wright; it was dismissed upon the circumstances, as it did not appear that the creditor had the clear means of making his demand effectual against the fund arising from the confiscation. But Lord Eldon at the same time, in one of the most luminous and convincing judgments extant, expressed his dissent from the principles of the former opinions; his Lordship thought, that as it could not be contended, that under such circumstances the personal liability of the debtor is taken away, so it could not be law, that under such circumstances the remedies resulting out of that liability should be restrained by confining the remedies to particular funds, or by confining them altogether as to the person, till the creditor has had recourse, not to all the funds of the debtor, but to some of his funds, which funds, in the original constitution of the debt, and the transaction forming the relation of debtor and creditor, the debtor did not propose, nor the creditor receive, as the funds to be charged by the contract. That considering it as a pledge, if the effect of the contract was, that he should have all the remedies belonging to the nature of a pledge, and also personal responsibility, it was questionable whether the Revolution would have operated to drive the creditor to the pledge, and to compel him to give up the other remedy at the instance of the debtor; but that the difficulty was much enhanced, when the pledge is not given to the creditors by the contract, but thrown to him by an act not his own. — *Eden.*]

As to marshalling securities in general, see 1 Story, Eq. Jur. ch. 13, § 633, et seq.

If the defendant, by any unfair pleading, had misled them, it would be different; but here he has stated his application to the State of [*340] Georgia fairly, and its failure of success; and wherever *a party throws itself on the defendant's answer, by not replying to it, he must take whatever the defendant swears to be true.

But, as he really thought the application made, even now, might be available, he ordered the cause to stand over, to make an application to the State of Georgia. (4)

(4) When the cause came on finally, the Lord Chancellor ordered the money to be paid over to Nutt, upon his giving security to refund it, if the decree should be against him. Lord Eldon C. observes on this, that, if his Lordship's doctrine was correct, there was no ground to direct such security to be given. Vide 6 Ves. 719, 731, and note (2), *antea*, p. 326.

PYBUS v. SMITH.

[Vide S. C. upon the first occasion, 1 Ves. jun. 189, &c.] Lincoln's-Inn-Hall.
3d August.

(Reg. Lib. 1790. B. fol. 683. b.)

A feme covert having a settlement of a real estate, and money in the funds, the rents and dividends to be paid to her, and as she should from time to time direct, with a contingent remainder, in failure of issue to herself, conveys the whole jointly with her husband as a security for the husband's debts, the conveyance must be carried into execution by a court of equity. (1)

By lease and release, dated 5th and 6th May, 1785, being a settlement subsequent to the marriage of the defendant, Thomas Vernon, with Anna-Maria his wife, the said Thomas and Anna-Maria, in pursuance of a decree of the Court of Chancery, released to the defendants, Smith and Leader, a messuage in Garland-Alley, Bishopsgate-street, in trust, to permit said Anna-Maria to receive, or otherwise during the life of said Anna-Maria, to pay, apply, and dispose of the rents and profits unto such person or persons, in such shares and proportions, manner and form, and to and for such uses and purposes, as she, the said Anna-Maria Vernon,

(1) Lord Thurlow had in this case a most anxious desire to find any principle of a court of equity strong enough to protect the property against the improvident act in question; and this earnest wish led his Lordship, in the first instance, to doubt whether the direction "from time to time" did not restrain a sweeping simultaneous appointment. (See the report in 1 Ves. jun. 194.) The point of law was, however, too strong to be contended with; and, as a married woman was in a court of equity treated as the absolute owner of property given to her, or according to her appointment, absolutely (which implied every right of alienation), so, at last, Lord Thurlow struggled hard in the principal case to induce Mrs. Vernon to exercise her right with a more provident care than she at first appeared inclined to do. "Whilst, however, the wax was yet warm upon the deed, the creditors of the husband got a claim upon it by an informal instrument; and the same Judge, who had made such efforts to protect her, was, upon authority, obliged to withdraw that protection." Vide per Lord Eldon C., 9 Ves. 493, 494; 11 Ves. 221, 222; 18 Ves. 634; 2 Meriv. 487, &c. Lord Thurlow then suggested, that such improvident acts might be prevented in future, by the introduction of words positively restrictive of any such sweeping alienation; and, for the first time, tried the experiment in the settlement of Miss Watson, wherein he himself was a trustee. Lord Eldon C., after often observing this, states, in 1817, that "Lord Alvanley, who followed Lord Thurlow, thought it a valid clause; and so it has remained ever since." Vide in *Jackson v. Hobhouse*, 2 Meriv. 487, 498, and the preceding references, *passim*. The earliest cases, and the course of judicial impression upon these subjects, will be found interspersed, *ubi supra*; and the Editor has now little more than to refer, in particular (agreeably to the notes of Lord Redesdale), to *Grigby v. Cox*, before Lord Hardwicke, 1 Ves. 517, and to *Frederick v. Hartwell*, before Sir L. Kenyon, M. R. (lately reported, 1 Cox, 193.) He should, however, state that he has already shortly observed upon the subjects in question in his notes upon *Hulme v. Tenant*, *Fraser v. Baillie*, *antea*, 1 vol. 16, 518, 519, and *Fettiplace v. Gorges*, *antea*, 8.

should by any writing or writings, under her proper hand, from time to time, direct or appoint, and in default of such direction, then into the proper hands of the said Anna-Maria, [to] and for her sole and separate use; and after the decease of the said Anna-Maria, then upon trust for such person, for such estate and estates, in such shares and proportions, and for such uses, and [charged and] chargeable with such sums, and subject to such powers, provisions, declarations, limitations, and agreements, and in such manner and form as the said Anna-Maria Vernon, whether covert or sole, by any deed or instrument in writing, with or without power of revocation, to be by her [duly (2)] executed, under her hand and seal, in the presence of two or more credible witnesses, should direct, limit, or appoint; and in default thereof, and as to such part whereof there should be no appointment, in trust for the said Anna-Maria Vernon, her heirs and assigns forever. And it was by the said indenture witnessed, that the said trustees should stand possessed of 2531*l.* four per cent. bank annuities, mentioned in the said decree, during the life of the said Anna-Maria, to pay and apply the dividends unto such persons, and in such shares and *proportions, manner and form, [*341] and to and for such uses, intents, and purposes, as the said Anna-Maria Vernon should, by any writing or writings, under her hand, direct and appoint, and in default thereof, to pay the same into the hands of the said Anna-Maria Vernon, for her sole and separate use; and after the decease of the said Anna-Maria Vernon, to sell the same, and pay and apply the money arising therefrom, to and amongst all and every the child and children of the said Anna-Maria Vernon, by the said Thomas; and in case there should be no child, or all of them should die under twenty-one, unmarried, then to such uses as said Anna-Maria Vernon should by any deed or instrument, in writing, under her hand and seal, executed in the presence of, and attested by two or more credible witnesses, direct or appoint; and in default thereof, for the executors and administrators of said Anna-Maria Vernon.

The defendant, Thomas Vernon, was a trader, and dealt with the plaintiffs, who were bankers, in the way of their trade, and applied to them to accept and pay such drafts as he should draw upon them, or make payable at their house, which they consented to; but in 1785, being considerably in advance on his account, they required him to give them security, which he proposed to do upon this separate property of the wife's; and by indenture, dated 5th August, 1785, made between the said defendant, Thomas Vernon, of the first part; the defendant, Anna-Maria Vernon, of the second part; and the plaintiffs, of the third part; reciting the settlement of the 5th May preceding, it was witnessed, and Thomas Vernon thereby covenanted to supply plaintiffs, their executors and administrators, with cash sufficient to pay and discharge all drafts, or bills drawn or made payable by him at their banking-house, or which should become due or payable; and defendant, Anna-Maria Vernon, did, by virtue and in pursuance of her power, direct and appoint that the rents and profits then due, or to become due, in respect of the premises, should, during her life, be paid, by the trustees, to the plaintiffs; and from and after her decease, the trustees should stand seised thereof, to the use of plaintiffs; and she also directed and appointed, that the interest and dividends then due, of all the 2531*l.* four per cents., should be paid by the trustees to plaintiffs, and immediately after her decease, without

(2) The word in the Reg. Book is, "duly" — not "only."

[*342] issue, should belong to, and the trustees should be *possessed thereof, for the use of the plaintiffs, upon trust, in case default should be made by the said Thomas Vernon in payment to plaintiffs, their executors or administrators, of any of the sum or sums of money so to be advanced by them to said Thomas Vernon; that it should be lawful to plaintiffs, &c., to sell the reversion in the real estate, and the contingent interest in the money in the funds; or to raise and take up by mortgage thereof, so much money, as, with the rents and dividends, should be necessary for paying the costs they should be put to, and for reimbursing them all sums in which the said Thomas Vernon should be indebted to them, on account of money so advanced and interest thereon, and if there should be any surplus, to pay the same to her; and the deed contained a power of attorney from the trustees to plaintiff, to receive the rents and dividends, and a covenant from plaintiffs, in case they were kept indemnified, to reconvey.

By deed-poll, dated 16th August, 1785, under the hand and seal of Anna-Maria Vernon, she, in consideration of the marriage, and of love and affection, and by virtue of her power, directed the trustees to pay the rents, and after her decease, to stand seised of the real estate to the use of her husband, in fee: and also to pay to him the dividends of the money in the funds; and after her decease, without issue, to stand possessed of the principal in trust for him absolutely.

In November, 1786, the plaintiffs having discovered this deed-poll, and having observed that though the deed of appointment extended to an indemnity against money paid upon drafts, or bills drawn upon, or made payable at their house, by defendant Vernon, that it did not extend to money paid for discount of bills or promissory notes, for the accommodation of the defendant Thomas, applied to him for a further security against such moneys advanced by way of discount, and by indentures of lease and release, dated 6th and 7th December, 1786, the estate and moneys in the funds were made a security for sums so advanced, or to be advanced.

The plaintiffs afterwards discounted several notes and bills of exchange for defendant Thomas, and were 1500*l.* in advance on his account, when, in 1788, a commission of bankruptcy was issued against him; upon [*343] which, they applied to the trustees to *pay the rents and dividends to them, and to join them in the sale of the reversionary and contingent interest of defendant Anna-Maria in the real estate, and money in the funds, in order to their indemnification; and, upon their refusal, filed the present bill; the prayer of which was, that the defendant should pay such rents and dividends, and join in such sale.

Mrs. Vernon, in her answer, submitted that the rents and profits of the real estate, and the dividends upon the money in the funds, ought to be paid into her own hands, for her separate use, and that they were not liable to the debts or engagements of her husband; and said, that she did not conceive, at the time of executing the deed, that she was conveying her life estate and interest, but only the reversion in case of her death without issue; and therefore hoped that the trustees would be decreed to pay the same to her.

The cause came on to be heard in Trinity term, 1790, when it was referred to the Master, to report under what circumstances the deed was executed; and the Master was to examine the parties on interrogatories. (3)

(3) Vide S. C. 1 Ves. jun. 189 - 194. Sir J. Simeon's MS. notes of the case, when it so

The Master reported, that, upon examination of witnesses examined before him on interrogatories, it appeared, that the deeds were executed by the defendants Thomas and Anna-Maria Vernon, freely and readily, and that no arguments or persuasions were used, at the time of executing the said deeds, by any person, to induce them to execute the same; but that the witnesses did not recollect that the deeds were read, or the purport thereof explained, to the defendant Anna-Maria; but one of the witnesses (who prepared the deed) said, that it was his constant practice to read, or explain, to all parties executing deeds prepared by him, and particularly to married women, the nature and contents of such deeds; and, therefore, he was induced to believe, that the deeds so executed were read or the purport thereof explained to the defendants, and understood by them, previous to the execution of them; and that the plaintiffs, upon their examination, stated that the security was executed upon the proposal of Thomas Vernon, that they had no concern in the preparation, and that they did not know of the preparation thereof, until after the execution; but, they believed, *the defendant Anna-Maria knew that [*344] she subjected not only the contingent reversion of her property, but also the income during her life, to the payment of the money which was, or should become due, from her husband to the plaintiffs; and that no attempt was made, or endeavor used to make her believe that she was only charging her reversionary interest with the same, and said that they did not advance any money to the defendant Anna-Maria for joining in the deeds.

The cause came on now upon the Master's report.

Mr. *Solicitor-General*, for the plaintiffs, stated the facts, and argued that a feme covert was, as to her separate property, exactly in the same state as a feme sole; (4) and that the payments, in this case, being to be made to her from time to time, could make no difference.

Mr. *Lloyd*, and Mr. *Needham*, for the defendants, said, the present case involved two questions; 1st. Whether the Court will give its assistance to carry the voluntary agreement into execution, even where the woman has received the money, and the transaction is perfectly fair. 2d. Whether this is a case in which the Court will lend such assistance. It is certainly in the power of a parent to give a daughter, who is married, a provision, which shall be payable from month to month, or at other periods, without giving her a power to assign it over at once. Here the legal estate is in the trustees, to receive the rents and interests, and to pay them to Mrs. Vernon, or to permit her to receive them, which is the same thing; for though to permit a man to receive rents and profits would, at law, be a good use, here the use would be executed in the trustees. The title of the plaintiffs is equitable and voluntary, and with full notice that she was a married woman; and the bill states, that, previous to the transaction, the plaintiffs had trusted Vernon as far as they dared.

Mrs. Vernon was an infant, and a ward of this Court, when Vernon

came on, contain the following passages: "And though the settlement was made in the Master's office, when the husband was insolvent, with a view to put everything out of his power, and to settle on her and her children, yet Lord Thurlow said, there was nothing to prevent her executing the power in favor of her husband, and as she had pledged it, it must answer the husband's debts as far as the life-interest extended; and the words, *from time to time*, made no difference, but affected her whole life-interest. Being, however, pressed by Mr. Lloyd, he referred it to the Master, to see if the deed was fairly made; though the Solicitor-General opposed it strongly, as there was no particular objection, on the ground of fraud, stated in the pleadings."

(4) See the references in note (1), *antea*, 340, especially 18 Ves. 434, and *Foley v. Burnell*, *antea*, 1 vol. 274, with the Editor's notes (2) *ibid.*, and *Pettipiece v. Gorges*, *antea*, 8.

carried her off to Scotland. It was agreed between him and her friends, that he should have part of her fortune, upon settling the rest upon her and her children. Upon this, he made a proposal by which, had it been carried into execution, she could not have appointed it in this way. [*345] When your Lordship *referred it to the Master, he disapproved it, and the present settlement was afterwards made. There are many cases where the husband's proposal has been considered as the agreement. In such a case your Lordship will never permit the trustees to be converted from trustees for her, to trustees for the plaintiffs.

The trusts are, that they shall permit and suffer her to take the rents from time to time; the proposals were, that they should pay them into her own hands; she was a married woman, and the Court intended it should be a provision from quarter to quarter, as the rents and interest were paid. It was intended as a maintenance, but the Court could not intend that she should, by one stroke, put an end to her future subsistence, but only that she should appoint the dividends as they became due.

If this is not so, it would be of no use to put in trustees into these settlements. Here, the defendant has disposed of her provision without their intervention, and swears that she was not informed the conveyance extended further than her reversionary interest.

In *Allen v. Papworth*, 1 Vesey, 163, (5) where it was held the wife might appoint her separate property for the husband's debts, she had the whole property; it was not intended as a maintenance. The inference from *Grigby v. Cox*, S. B. 518, is, that if the words there had been as they are in this, "to pay from time to time," the wife could not have conveyed it away. In *Machorro v. Stonehouse*, cited in *Hulme v. Tenant* (ante, vol. i. p. 18), the purchaser's bill was dismissed; that case is well worth considering, for Sir Thomas Sewel was in great business at the time the cases on the subject were determined, and must have known what was done.

In this case, the agreement being different from the first proposal, the children would be entitled to have the settlement varied.

As to the propriety of carrying the agreement into execution; it is merely an equitable agreement, and the plaintiffs are applying to change the terms of it. If the agreement is an improper one, the Court will not carry it into execution; it was executed either in great distress, or under [*346] the control of her *husband, and the deeds were prepared from the instructions of the husband alone; by her answer it does not appear she knew what was done; the plaintiffs knew she was to receive no compensation for it.

If the wife conveys her separate property to the husband himself, without doubt that will not avail; yet there is no positive law that such a conveyance shall be set aside.

If they were failing in their circumstances, that would be a sufficient ground to set the transaction aside.

Lord CHANCELLOR said, if the point was open, he should have thought that a feme covert who had a separate estate, should not part with it, without an examination,(a) but a feme covert had been considered by the

(5) It is very defectively stated in Mr. Vesey's report. See it stated from the Reg. Book, in the Editor's Supplement to Vesey, 88, et seq.

(a) In *Smith v. Ewing*, 3 Desaus. 462, it is said, that a married woman, who has a separate estate, cannot part with it, or charge it, in any way, without an examination, as, by marriage,

Court, with respect to the separate property, as a feme sole; therefore, though he had been desirous of going as far as he could, he found he had gone too far upon a former occasion.† If a feme covert sees what she is about, the Court allows of her alienation of her separate property. (b)

*If it was the intention of a parent to give a provision to a child [*347] in such a way that she cannot alienate it, he saw no objection to its being done; but such intention must be expressed in clear terms.

It was referred to the Master, to inquire whether the plaintiffs had any other security. (10)

she loses all the powers of a feme sole. See also *Watson v. Cheshire*, 1 McCord, Ch. 241; *Maywood v. Johnson*, 1 Hill, Ch. 236. In *Morgan v. Elam*, 4 Yerger, 375, it is held, that a married woman is to be considered a feme sole, in reference to her separate estate, only so far as the deed creating the estate has expressly conferred on her the power of acting as a feme sole. See also *Lancaster v. Dolan*, 1 Rawle, 231; 2 Kent (5th edit.), 166.

† His Lordship referred to a case of *Ellis v. Atkinson* [Rep. postea, 565], which came on in Easter and Trinity, 1789, where the limitations in the settlement were, that the trustees should pay the interest of 2000*l.* in the funds into the plaintiff Susannah's own hands, or to such person or persons, as she, notwithstanding her coverture, should, by writing, under her hand, from time to time, appoint; to the intent that the same should be for her sole, separate, and peculiar use; and might not be subject to the debts, &c. of the husband. The husband and wife filed the bill, praying that the trustees might assign the property to the husband. It stood, as a short cause, for the last day but one of Easter term, and the wife attended in Court to consent: (6) Lord Chancellor doubted very much whether he could take her consent, but took it *de bene esse*, and desired the point might be considered the next term, when it was argued much at large, by Mr. Solicitor-General, and Mr. Hollist, for the plaintiffs, who cited the case of *Clarke v. Pistor*, and *Nieman v. Cartoney*, which shall be stated below. Lord Chancellor took time to consider; [but afterwards decreed according to the prayer of the bill. Vide postea, 565, 568.] (7)

Clarke v. Pistor, Rolls, 25th March, 1778. By settlement, 8th Feb. 1776, Bank stock was covenanted to be, and was transferred to trustees, in trust to pay the interest and dividends to such persons, &c. as plaintiff Margaret should, from time to time, during her life, notwithstanding her coverture, by any note or writing under her hand, direct or appoint, and in default of appointment, into the proper hands of plaintiff Margaret, for her separate use; and after her death, to transfer the stock to plaintiff, the husband, absolutely. On bill filed by the husband and wife, without appointment, (8) and on consent of the wife, the Court directed the trustees to transfer.

Nieman v. Cartony, 24th April, 1771. A legacy had been given to the wife for her sole use, with a power of appointment by will, and in default, to her executors. It was ordered, on her consent, to be paid to the husband.

It was also said, in arguing *Ellis v. Atkinson*, that Lord Kenyon, when at the Rolls, had, upon great consideration, in the case of *Mrs. John Buller*, (9) who was entitled to separate property for life, with remainder to her children, with her consent, ordered a part to be raised for the advancement of a child.

(6) It seems the examination of the wife in *Ellis v. Atkinson*, and in *Frederick v. Hartwell*, 1 Cox, 193, was, in each case, totally unnecessary and irregular. Vide 8 Ves. 173, 174, 175, 183, &c.; 10 Ves. 582; 13 Ves. 190, 192, and the Editor's note to *Fraser v. Baillie*, ante, 1 vol. 518, 519. Sed vide per Lord Hardwicke C., in *Powlett v. Dalaval*, 2 Ves. 669, 670.

(7) Correction in Mr. Brown's copy.

(8) So likewise in *Allen v. Papworth*, 1 Ves. 163; but more fully, Supplement to Vesey, senior, 88, a bill filed by husband and wife, and a consequent decree, was held equivalent to an actual appointment.

(9) That case is reported in 1 Cox, 357 (*McCarmick v. Buller*), and is much observed upon by Lord Eldon C., 8 Ves. 174, et seq. It seems now of no authority. Vide 8 Ves. 174, et seq.; 10 Ves. 684, 685, &c., and the Editor's note to *Fraser v. Baillie*, ante, 1 vol. 518, 519.

(10) The Court ordered an account of what was due to the plaintiffs for principal and interest on any such drafts, notes, and bills of exchange, as were mentioned in the bill; and to inquire whether they had any other securities in their hands other than the two deeds of the 15th August, 1785, and 7th December, 1786, for securing the payment of their debts; and what had been received on the same, and what was become of them. And an account was directed of the rents and profits of the premises, and of the interest of the trust-funds received by the trustees since they had notice of the appointment or assignment made in favor of the plaintiffs. — R. L.

Whilst the Court was thus endeavoring to protect the property, the wife's improvident acts defeated its care. See in note (1), ante, 340, referring to 9 Ves. 493, 494; 11 Ves. 221, 222; 18 Ves. 434; 2 Meriv. 487, &c.

(b) See *Hulme v. Tenant*, 1 Bro. C. C. 16, 20, note (a), and 21, notes (3) and (a), and cases referred to; 2 Story, Eq. Jur. ch. 37, § 1388, et seq., and notes.

FOSTER and Others v. COOK and Others.

Lincoln's-Inn-Hall, 3d August.

(Reg. Lib. 1790. A. fol. 628. b. Entered *Foster v. Stopes*.)

Testator (his wife being *enciente*) gave his estate to trustees, to apply profits for the use of the child during infancy, and at twenty-five to the child in fee; but in case the child should die before twenty-five without leaving issue, remainder over. The child was still-born. After which testator made a codicil, affirming his will, and died without issue. Forty-three weeks after his decease, the widow is brought to bed of a son (who is found to be legitimate). The son cannot take the estate, but the devisees over shall take. (1)

In the will, the testator gave his wife an annuity; she shall, notwithstanding, have her dower. (2)

He also ordered the trustees to possess themselves of his estates and substance, and to pay debts; this is a charge of the debts on the real estate.

And the assets shall be marshalled for the legatees, to let them in, so far as the personal estate has paid towards the debts.

[Birth of the posthumous child held no revocation of the will.] (3)

HENRY COOK, seised of freehold messuages, &c. in Bucks, of the yearly value of 130*l.*, subject to mortgages thereon; and also possessed of two leasehold estates for long terms; and of other personal estates (Jane, his wife, with whom he had intermarried on the 7th June, 1779, being then *enciente* of a child), made his will, 22d June, 1779, duly executed and attested to pass real estate, and thereby gave to the plaintiffs (the trustees) all his real and personal estate whatsoever, upon trust to pay his wife an annuity of 50*l.* a year during widowhood, and in case she should marry again, then to pay her an annuity of 30*l.* only; and testator desired his trustees to permit his wife to have the use of his mansion-house, and such furniture therein as she should think proper, during her widowhood, and not otherwise; and he thereby ordered and directed, that the child, wherewith his said wife was then pregnant, should be nourished and brought up with his said wife, until it should attain twelve years of age; and desired his trustees should improve and manage his real and personal estates, and all other his substance and effects whatsoever, in the best manner they could, for the benefit of the said child in all needful and necessary support and maintenance whatsoever, at their discretion [*348] (and gave particular directions *for the maintenance and education of the child at different ages); and the testator then disposed of his real and personal estates in the manner following; "and when my child shall arrive at its full age of twenty-five years, then I give, devise, and bequeath, all my said real and personal estates whatsoever, lands, tenements, and hereditaments, with the rights, members, and appurtenances thereto belonging, forever; but not to sell or mortgage the same; charged and chargeable, nevertheless, with the payment of the annuity bequeathed to my wife, by this my will; and in case my said child should happen to depart this life without leaving any issue, then, and in such case only, and not otherwise, I give and devise all my said real and personal estate, to my loving cousins George Foster, John Foster, William Foster, Mary King, and Jane Marriott (five of the defendants), to hold to them and their heirs and assigns forever;" and after giving to his uncle (the plaintiff), Wil-

(1) Vide Sir J. Simeon's MS. note, *postea*, 350.

(2) Vide etiam, accordingly, *Pearson v. Pearson*, ante, 1 vol. 292; *French v. Davies*, 2 Ves. jun. 572; *Strahan v. Sutton*, 3 Ves. 250; *Greatorex v. Carey*, 6 Ves. 615; *Lord Dorchester v. Earl Effingham*, Coop. Ch. Ca. 319; and vide 1 Roper, Bar. & Feme, 555, et seq., especially 568, &c., 570, &c., 578, &c.

(3) Vide Sir J. Simeon's note, *postea*, 350.

liam Foster, a legacy of 100*l.*, to be paid him within five years after his decease, and other pecuniary legacies, the testator declared his will to be, that the plaintiffs should, with all convenient speed, after his decease, take an inventory of his effects and household goods, and possess themselves of all his estates and substance, and improve the same for the benefit of his said child; and to pay all his just debts, and to keep an account of all payments or disbursements on account of the trusts, and to render an account to said child when thereto required, and to reimburse themselves, &c., until the child should attain the age of twenty-five years; and appointed the plaintiffs executors, in trust, until the child should attain twenty-five, and gave them power to raise money for the child's benefit, and gave the trustees 10*l.* each for their trouble.

Jane Cook was, on the 28th October, 1779, delivered of the child of which she was enciente at the time of the testator's making the will, but such child was still-born.

The testator, 24th November, 1779, made a codicil to his will, by which he gave to his wife 20*l.* and another legacy, and in case any overplus should remain in the hands of his trustees, after payment of all his just debts and legacies, out of his stock and personal estates, he ordered such overplus to be divided into two parts, and gave one moiety thereof to his wife, and the other moiety to the plaintiffs, over and above their legacies, and *desired that the codicil might be annexed to, [*349] and make part of, his last will and testament, to all intents and purposes, and be deemed and taken as part thereof.

Henry Cook, the testator, died 14th January, 1780, without leaving any issue, and without revoking his will, which the plaintiffs proved in the Ecclesiastical Court.

Jane Cook, the defendant's widow, was delivered of a son (the defendant Henry Cook) on the 9th day of November, 1780.

The testator was, at his decease, indebted by specialty and simple contract.

Different claims being set up, especially with respect to the legitimacy of the defendant Henry Cook, who was born forty-three weeks, except one day, after the testator's decease, and whom the devisees over contended, to be, on that account, illegitimate; and the heir-at-law, in case the defendant Henry was illegitimate, also claiming the whole; the widow also claiming dower, and a moiety of the residue of the personalty, if any: the plaintiffs, the trustees, filed the present bill, praying that the will might be established, an account of the personal estate, and, in case it should be insufficient to pay funeral expenses, debts, and legacies, that a sufficient sum might be raised out of the real estates to make good the deficiency, and that the rights of the persons entitled to the real and personal estates might be declared.

The defendants having, by their answer, made the claims imputed to them in the bill, the cause came on to be heard, on the 4th July, 1783, before the then Lords Commissioners; when an issue was directed to try the question of the legitimacy of the defendant, Henry, by trying whether Edward Cook (who claimed to be heir, if Henry was illegitimate) was the heir-at-law of the testator; in which issue, the said Edward Cook was to be plaintiff, and Henry Cook defendant.

The issue was tried, and, by a verdict for the defendant Henry Cook, his legitimacy was established.

*The cause had come on 23d June, 1784, upon the equity [*350] reserved, when the proper accounts were ordered, and further directions reserved.

It came on now for further directions, when three questions were made;

First, As to the claims of Henry Cook, and the contingent devisees over, as to the real estate.

Secondly, Whether the wife was entitled to dower as well as her annuity.

Thirdly, Whether the assets were to be so marshalled, as to let in the legatees upon the real estate.

On the first point —

Mr. *Solicitor-General*, for the infant, Henry Cook, contended that he had a right to the estate. The event has not happened, in which the testator has given it over, which was upon the child, of which the wife was then enciente, being born, and dying without issue, under twenty-five years of age; the will making this provision, and the event not having happened, the testator is dead intestate, and the infant (who is found by the verdict to be his legitimate son) is entitled as heir-at-law. The codicil, being made after the child was still-born, could only be referable to those parts of the will which remained, therefore no disposition was made of the real estate. In the case of *Miller v. Faure*, 1 Vesey, 85, though the first devise failed, the second could not take place, because the event in which it was given had not happened; and although the contingency, in this will, is not so clearly expressed as it there was, it is a contingency, in case the child come into *esse*, and die under twenty-five, without issue, upon which it is given over; and that contingency has not happened.

Lord CHANCELLOR said, he owned, it appeared to him a desperate case for the child. (4)

His Lordship also observed, that he saw no reason why the widow should not have her dower. (5)

[*351] *Mr. *Mansfield*, and Mr. *Hollist*, contended that, upon the case, the widow could not take both the annuity and her dower. It is an annuity of 50*l.* for life, if she continues so long his widow; if she marries again, then only 30*l.* a year. He could not mean she should have this and her dower. The trustees are to have possession of the whole estate, and out of it are to pay her the annuity; which is inconsistent with her having the third part as dower. Her claim would put the trustees out of possession. This is stronger than the modern cases that have infringed upon the rule, that nothing but what is express shall deprive a woman of her dower. In *Arnold v. Kempstead*, Amb. 466, it was held the wife was to have no more than the annuity out of the estate. In *Villa-real v. Lord Galway*, Amb. 682, it was held, that giving her dower, would disappoint

(4) Upon this point [and the one in the marginal note, ante, 347], "The Lord Chancellor held clearly, that the child born after the will could have no right, as there was a clear devise to others upon the death and failure of issue of the child *en ventre*, which was rendered still stronger by the codicil attested to pass land, which operated as a confirmation of the will. And that nothing could serve him but stretching the cases of implied revocation upon the marriage and birth of a child after a will, to the case of a child born after the will, *præter spem*, though of a marriage prior to the will, which had been contended for in some cases. That there was not the least prospect of success on such a case; and, therefore, declared the interests of the parties in the cause accordingly." — From Sir J. Simeon's MS. notes.

(5) "Lord Thurlow C., held, that she should not be driven to her election, but might take her dower, and also the benefits given her under the will. For that dower was an inchoate right during coverture, which could not be taken from the wife but by express language, or an inference which was irresistible, amounting to declaration plain. That upon mere conjecture and slight probability, as in this case, she should not lose her plain legal right; and therefore decreed accordingly." — From Sir J. Simeon's MS. notes. See also the references in note (2), ante, 347.

the will. *Jones v. Collier*, Ambl. 730, is also a strong case against her taking her dower.

With respect to the charge of debts, it is not sufficient, here, to make a charge upon the real estate. It is only a discretionary power to raise out of the personalty sufficient to pay the debts; he clearly meant only the personalty to be liable. There is no case, where the real estate has been devised, that the Court has marshalled the assets.

LORD CHANCELLOR. With respect to the charge for payment of debts, he directs the trustees to possess themselves of all his estate and substance to pay debts; it is a most direct charge. (a)

Then as to the other point, the wife has a charge upon the estate, paramount the will; she has an absolute right to the third part; it is not his to deprive her of it. But, here, it is to be gathered from circumstances that she is not to have it; and because he gives all his property to the trustees I am to gather, from his having given all he has, that he has given that which he had not. So far from a declaration plain, I have nothing even to lead me to think he meant to deprive her of dower. She must, therefore, have her dower. (b)

And the legatees must come upon the real estate, so far forth as the personalty has been applied in payment of debts. † (6) (a)

† In *Bradford v. Foley*, (7) 14th August, 1791, Tempest Hay, by will, dated 1762, after directing all his debts and funeral expenses to be paid, devised all his real estates to *trustees, to the use of his son for life, remainder to his first and other sons by any [352] future marriage, in tail mail, with remainder to daughters as tenants in common, and the testator did declare, that if his said son should intermarry with any woman related to his then present wife, the uses limited, so far as the same should relate to the issue of such future marriage, should cease and determine; and the trustees should stand seised of all the premises, to the use of all and every the children of testator's brother, John Hay, deceased, who should be living at the time of his death, share and share alike; and in case all the children of testator's said brother should happen to die in his the said testator's lifetime, or after his death, without issue, he gave and devised all his real estates unto his own right heirs, that is, such as should be no way related to M. A. his son's then wife; and the testator, after giving divers legacies to persons named in the will, directed the residue of his personal estate not therein before disposed of, to be laid out in government securities, in the names of his executors, to be settled and applied to the same uses as his real estates were therein

(6) Lord Redesdale's notes suggest a doubt, whether the reports here, of *Bradford v. Foley*, and *Wehster v. Alsop*, are accurate? The Editor cannot find any entry of the first case in the Reg. Book; but as Mr. Brown's report of the latter agrees with its entry in R. L., and the principle has been often adopted, both before and after all these decisions, the Editor sees no reason to discredit the above note of *Bradford v. Foley*. The will in that cause, upon another point, is stated in Douglas, Rep. K. B. 63.

(7) Reg. Lib. 1790, A. fol. 512, b., which agrees with this report. — Editor.

(a) As to the words which constitute a charge of debts, see *Batson v. Lundegreen*, 2 Bro. C. C. 94, and notes; *Rain on Assets*, ch. 28, § 3, p. 343; 2 *Williams*, Ex. Pt. 4, B. 1, ch. 2, § 2, p. 1057.

(b) If a testator should bequeath property to his wife, manifestly with the intention of his being in satisfaction of her dower, it would create a case of election. But such an intention must be clear, and free from ambiguity. And it will not be inferred from the mere fact of the testator's making a general disposition of all his property, although he should give his wife a legacy; for he might intend to give only what was strictly his own, subject to dower. There is no repugnancy in such a bequest. In order to exclude dower, the instrument containing the bequest ought to contain some provision, inconsistent with the claim to it. 3 *Wooddes. Lect.* 69, p. 493; *Arnold v. Kempstead*, 2 Eden, 237, and cases cited in the notes; 1 *Eq. Abr.* 218, B. 1, pl. 1; *Villareal v. Galway*, Amb. 682; S. C. 1 Bro. C. C. 292, notes; *Fuller v. Yates*, 8 Paige, 325; *French v. Davies*, 2 Ves. jun. 576, 577; *Lawrence v. Lawrence*, 2 Vern. 366, and *Raithby's note*; 1 *Swanst.* 393, note; *Greatorex v. Cary*, 6 Ves. 615; *Birmingham v. Kirwan*, 2 Scho. & Lef. 452, 453; *Pearson v. Pearson*, 1 Bro. C. C. 292, and notes; *Harrison v. Harrison*, 1 Keen, 767. See 2 *Story*, Eq. Jur. ch. 30, § 1088; *Hill v. Hemsworth*, Lloyd and G. Temp. Plunk. 87; *Hall v. Hill*, 1 Dru. & War. 94; S. C. 1 *Con. & Law.* 120; *Baily v. Duncan*, 4 *Monro.* 265, 266; *Hall v. Hall*, 2 *McCord*, Ch. 280; *Herbert v. Wren*, 7 *Cranch*, 370; *Adsit v. Adsit*, 2 *John.* Ch. 448; *Smith v. Kniskern*, 4 *John.* Ch. 9; *Dickson v. Robinson*, Jacob. 603; *Shaw v. Shaw*, 2 *Dana*, 342; *Morgan v. Edwards*, 1 *Dow & Clark*, 104; *Clancy, Rights of Women*, ch. 6 (Am. ed.), p. 241, 242, 243; *Gordon v. Stevens*, 2 *Hill*, Ch. 48. In respect to the law of Massachusetts on this head, see *Reed v. Dickerman*, 12 *Pick.* 146; *Pearson v. Pearson*, 1 Bro. C. C. 292, n. (a).

before limited to; testator died, leaving issue his son Thomas, and leaving several of the defendants, the children of his brother John. By the decree, on the hearing of the cause, the will was established, and it was among other things ordered, that the personal estate of the testator should be applied in payment of his debts, funeral expenses, and legacies, in a course of administration; and that, in case the testator's personal estate should not be sufficient to pay his debts, funeral expenses, and legacies, his Honor declared the real estate was subjected, by the will, to the amount of debts and funeral expenses; that the real estate or a sufficient part thereof should be sold, and the money arising from the sale be applied in making good the deficiencies; and in case any of the creditors had received anything out of the testator's personal estate toward satisfaction of their demands, then they were not to receive any part of the money arising from the said sale, till the other creditors were paid up equal with them.

The estate had been sold; and the personal estate not being sufficient for payment of debts and legacies, they were ordered to be paid out of the money produced by the sale of the real estate.

In *Webster v. Alsop*, (7) *Rolls*, 12th July, [and 5th August,] (7) 1791, John Taylor, by will, dated 2d January, 1788, directed all his just debts and funeral expenses to be paid out of his personal estate; and if his personal estate should not be sufficient, he charged his real estate with so much thereof as his personal estates would not extend to pay; and then devised his real estate to trustees, subject to annuities and other payments, to the use of the plaintiff for life, with remainders over, and gave several legacies; and the personal estate proving deficient, it was declared that the legatees were entitled to stand in the place of the creditors, for so much of the personal estate as had been exhausted by them in the payment of their debts.

(7) See note (7) in the preceding page.

HUGHES v. HUGHES.

[Vide *S. C. postea*, 434, and on rehearing 14 *Ves.* 256.] *Lincoln's-Inn-Hall*, August 3.

(No Entry on this occasion. Sed Vide *S. C. postea*, 434.)

Gift of a residue, to apply rents, &c. to the maintenance of all the children of the testator's daughter, till the youngest should attain twenty-one, then the principal to be divided among them, and the children of such as should be dead. [This bequest ultimately held to include all the children, born or to be born, and the children of any deceased children, until the youngest came of age; (1) but that the clause, referable to the children of such as should be dead, excluded the personal representatives of such as died without children.] (2)

THOMAS CHAMBERLAIN, being seised and possessed of real and personal estates, made his will, 22d July, 1779, and, thereby, devised his real estate in the county of Oxford to trustees, in trust for his grandson, Thomas Chamberlain Hughes, for life, with remainders over, subject to an annuity of 100*l.* to his daughter Rebecca Hughes, for life, and after [*353] giving 400*l.* in *trust, for Elizabeth Cross for life, and afterwards for her children, and after giving directions touching 2000*l.* 3 per cent. bank annuities, therein mentioned to have been appointed for the use of the plaintiff Susannah Adlam, and her children, and directing that, in case of the death of all her children under twenty-one and before marriage, the said 2000*l.* should revert to, and be part of the residuum of his personal estate; the testator directed that the rents and profits of his houses in Princes Street, &c. and the dividends of his moneys in the public funds, and all other his personal estate, except the above 2000*l.*, should be paid and applied by the trustees, in the manner following; unto each of his two daughters, the plaintiffs Susannah Adlam, and Devereux Kennedy, to each of their separate use, the yearly sum of 100*l.* during their lives, and

(1) and (2) Mr. Brown's original report of this part of the case, and at p. 355, was most erroneous. The case was not finally determined on the present occasion, and the decision was contrary to Mr. Brown's statement when it did take place. Mr. Brown notices the mistake, *postea*, 434.

The cause was reheard about sixteen years afterwards, before Lord Eldon C., upon the point above alluded to by note (2). See the report, 14 *Ves.* 256.

subject thereto, to pay all the rest and residue of said last-mentioned rents and profits, and interest, for the maintenance and education of all the children of his said three daughters, Rebecca Hughes, Susannah Adlam, and Devereux Kennedy (except said Thomas Charles Hughes, or such of his grandsons as should be in the receipt of the rents of the real estate), share and share alike, until the youngest of said grandchildren should attain twenty-one; and in the case of the death of any of them before the youngest should attain twenty-one, who should have been married, and should have at his or her decease a child or children, then testator directed, that such child or children should be entitled to the same share which their deceased parents would have received, in case they had respectively lived till the youngest of such child or children should have attained twenty-one; and when such youngest child should have attained twenty-one, then testator gave one full and proportionable share of the capital thereof, to the proper use of such his said grandchildren as should be then living, and the child or children of such as should be dead. (3)

Devereux Kennedy, at the death of the testator, had six children (who are plaintiffs); she, after his decease, had another child, the defendant, Louisa Kennedy; Rebecca had only one child, the plaintiff Robert Hughes, but afterwards had issue the defendant Sophia Hughes; and Susannah Adlam had four children, who were also plaintiffs, but, after his decease, had two other of the defendants.

The bill prayed that the rights of the parties might be declared.

*At the hearing, the proper accounts had been directed, and [*354] further directions reserved.

It came on now again; and the question was, whether the plaintiffs, being the children of testator's three daughters, born at the time of his decease, were to take exclusively of the defendants, who were born after his death, or they were all entitled.

Mr. *Mansfield*, and Mr. *Hollist*, for the plaintiffs, contended that the construction of the will could not be extended further than the children born at the decease of the testator. It has been held, upon similar words, only to include children born at the death of the testator, *Heathe v. Heathe*, 2 Atk. 121. The postponing the division till the youngest attains twenty-one will make no difference; where there is a gift to one for life, and then to be divided among children, as was the case in *Congreve v. Congreve* (ante, vol. i. p. 530), all will take, but not where the description is the children of such an one; it then only speaks at the death of the testator.

Mr. *Solicitor-General*, and Mr. *Mitford*, for the defendants, argued that the devise extended to all the children; there is no doubt that in the case of Mrs. Adlam, who has an estate for life, all her children will take; and it cannot be contended, that he meant the will should take a different construction, with respect to her, from the other daughters. The time of the division is when the youngest shall attain twenty-one; then all born before the youngest attains twenty-one must take. If any of the children died before the youngest attain twenty-one, their children were to take their shares; but their children might be born after the decease of the testator, and it would be hard, that the grandchildren born after should take, and not a child born after. The words are, all and every

(3) "Who he directed should be entitled to the proportionable shares their deceased parents would have been entitled to receive, in case he or she had been living at the time of such distribution; and to their executors respectively."—R. L. 1791, A. fol. 215, b.

the children, which are sufficiently extensive to take in those born after; and more properly refers to them, than only to those living. In the gift of the capital, the word *then* evidently refers to the time of the distribution; and he meant that such grandchildren as should be then living, and the children of such as were dead, should take. There is no actual gift till then. In *Congreve v. Congreve*, the words were, all and every [*355] the child and children of Thomas Congreve, at twenty-one. *That case has been often cited, and determined upon. At least, it will be open till the youngest child then living should attain twenty-one, when the division was to take place. We only ask it for children under that description.

Lord CHANCELLOR, during the argument said, (4) when the gift was general, it was always confined to the death of the testator; where there is a gift for life, or the distribution is postponed to a future time, then children born during the life, or before that time, are let in. *Congreve v. Congreve* (a) seems a very strained determination; because, when the first child attained twenty-one, the division must be made. His Lordship finally determined (5) in favor of the children alive at the decease of the testator.

(4) The reporter's mistake seems most thorough and incomprehensible, since the Lord Chancellor quite reverses these positions, *postea*, 435.

(5) Not so, but *contra*. Vide S. C. *postea*, 434.

(a) 1 Bro. C. C. 530, and see the notes, and *Devisme v. Mello*, 1 Bro. C. C. 537; Atty. Genl. v. Crispin, 1 Bro. C. C. 386.

SPINK and Another v. LEWIS and Others.

Lincoln's-Inn-Hall, 5th August.

(Reg. Lib. 1790. B. fol. 606. b.)

Testator ordered real estate to be sold, and the residue to be laid out in the funds, to remain for ten years, and at the end thereof gave the same to his next of kin. [Although the expression "next of kin" means generally those who are so at a testator's death; (1) yet here upon the intention the period of vesting was held to be at the expiration of the ten years.] The testator [therefore] having but one brother, who was such next of kin, [at his death] but who died within the ten years; so much as was produced by the real estate was held to belong to the heir-at-law of the testator; (2) so much as was personal going to the representatives of the brother.

SAMUEL JOHNSON, seised of real and possessed of personal estate, made his will, 9th February, 1779, and thereby gave all his lands, &c. to the plaintiffs and William Johnson, son of his brother William Johnson (since deceased), and their heirs and assigns, in trust to sell the same, and directed the money to be laid out at interest in the public funds, and, thereby, gave an annuity of 8*l.* to Mary Johnson, and also gave to the two grandchildren of his brother John Johnson, an annuity of 10*l.*, and then ordered "the residue of his personal estates, and the money arising therefrom, to be vested in the public funds, and there be and remain for the space of ten years," and, at the end and expiration of the said term, he

(1) Vide (inter alia) in *Anderson v. Dawson*, 15 Ves. 536. { See *Myers v. Myers*, 2 McCord, Ch. 214. }

(2) Vide *Ackroyd v. Smithson*, *antea*, 1 vol. 503, and the Editor's notes.

willed and directed that the same, together with the interest, and accumulated interest which should have accrued thereon, should be divided into six parts, one sixth part whereof he directed to be paid to the said William Johnson, the son, or to his legal representatives, and the other five parts thereof to be divided among such of his next of kin and legal representatives as should be then living, under the usual and due course of representation, and appointed the plaintiffs and the said William Johnson, the son, joint executors of his said will.

*The testator died the 17th June, 1779, leaving said William [*356] Johnson the elder his only brother and next of kin, and leaving the defendant Sarah Chapman his great niece and heiress-at-law.

The executors proved the will, and sold the real estates, and invested the money in the funds, and, out of the interest thereof, paid the annuities to the persons whom they thought entitled; with respect to which there was a question which does not appear, by the decree, to have been decided.

The period of ten years, at the expiration of which the division was to be made, expired 17th June, 1789.

The bill prayed, that the defendants might set forth what interest they respectively claimed; which they did by their answers; and, at the hearing, it was referred to the Master to take the proper accounts, and to report who were the testator's next of kin, at the time of his decease, and at the expiration of ten years therefrom, being the time at which the division was ordered to be made.

The Master reported, among other things, that, at the time of the testator's decease, William Johnson was the only surviving brother of the testator; and that his next of kin, the 17th June, 1789, were the defendants Mary Jarrold and Isaac Johnson, surviving children of William Johnson; and he reported that William Johnson, the brother, died 18th December, 1781, leaving the defendant Frances, his widow and three children, viz. said William Johnson, said Isaac Johnson, and Mary Jarrold; that Frances Johnson is the administratrix of William Johnson; and that William Johnson, the son, is also dead intestate, leaving the defendant Elizabeth (now the wife of defendant Hastings) his widow, and one child only, named Samuel (since deceased); and that said Elizabeth Hastings is the administratrix of her said late husband, and also of her son.

The cause came on now for further directions upon these questions,

1st. Whether, under this will, the next of kin, at the time of the making the will, or at the time of distribution, would take?

*2d. If the former, and that by the death of William Johnson [*357] the residue was become lapsed, whether there was a resulting trust for the heir, as to so much of it as was the produce of the real estate?

Mr. *Solicitor-General*, as to the first question, submitted that, according to the true intent of the will, in the events that have happened, those persons who would be the next of kin at the expiration of the ten years were to take. At the time of making the will, William his brother, was his sole next of kin, which he must have known, as he mentions him in his will, but he never could mean him by the word, *amongst*, which shows he had in contemplation a number, amongst whom there could be a division.

Mr. *Mansfield*, and Mr. *Abbot*, for the heir-at-law. The gift of the residue must be construed to be to the next of kin at the time of the

decease; it is immaterial that the testator has mistaken the number he had of nephews and nieces, whom he might probably think next of kin. In *Cro. Eliz.* 576, the Court thought the words related to the death of the party, not the time when it would come into possession; then it has lapsed, by the death of the next of kin, within the ten years; and the disposition, by that means, failing, so much of it as arose from real estate must result, as such, to the heir, as in the cases of *Digby v. Legard* (3) (cited vol. i. p. 501), and *Ackroyd v. Smithson* (ante, vol. i. p. 503).

Mr. *Fonblanque* (for Frances Johnson, the representative of William Johnson, the brother of the testator, and Elizabeth Hastings, the widow of Johnson the son), contended that, if William Johnson was entitled, as next of kin at the time of the testator's decease, his representatives must be entitled now. The whole fund is converted into personalty, and must pass as such, as in the case of *Mallabar v. Mallabar*, For. 78; and *Durour v. Motteux*, 1 Ves. 320, where it was held not to be a resulting trust for the heir. Whatever would go to the executor, if he were not excluded, must, where he is so, go to the next of kin. In this case, if not excluded, the executor must have taken the whole. In *Digby v. Legard*, and *Smithson v. Ackroyd*, the real estate was converted into personalty, only for certain purposes; but here it was converted for all purposes.

[*358] *Lord CHANCELLOR (during the argument) said, it was plain the testator meant, by next of kin, some class of persons of whom it was doubtful whether they would live ten years, and it was meant that they should pass through that chance. The question was, whether he was at liberty to take notice that, at that time, he had but one brother. If he had had several brothers, and nephews, sons of brothers, there would not have been a doubt, that the division must have been among such of them as survived at the end of the ten years; and if the brother would have taken, had he lived, dying within the ten years, it would be undisposed of. (a)

At the close of the argument, he said [the produce of the real estate] appeared to him to be lapsed; and he did not see how the heir could be disappointed. The decree therefore declared, that, by the disposition of the rest and residue of the testator's personal estate, or the money arising therefrom, the produce of the real estate, as well as personal estate, was intended to pass; but that William Johnson, the only next of kin of the testator living at his death, having died before the end of ten years from the death of the testator, the disposition of five sixths of that fund hath lapsed, and [such five sixth parts are] to be considered as undisposed of: and so much thereof as arose from the real estate belongs to the heir-at-law of the testator, and so much as hath arisen from the personal estate belongs to the representative of William Johnson [the elder], the sole next of kin [subject to the distribution after mentioned]; and the Master was directed to inquire how much had arisen from each fund; (4) and the

(3) Vide 3 Cox, P. W. 22, note, last edit., and the Editor's notes to *Ackroyd v. Smithson*, and *Fletcher v. Ashburner*, ante, 1 vol. 495, 502.

(4) So much as arose from the real estate was to be carried over to the account of the testator's heir-at-law; and one third part of whatsoever should be found to have arisen from

(a) The meaning of "next of kin" always is, those who are so at the time of the death of the testator. *Anderson v. Dawson*, 15 Ves. 537; and therefore where an estate for life has been given, with such a limitation over, the description has been held to comprise such as were testator's next of kin at the time of his death, not at the time of the limitation taking effect. *Masters v. Hooper*, post, vol. iv. 207; *Doe v. Lawson*, 3 East, 278. — *Eden*.

other sixth part was declared to belong to the personal representative of William Johnson the son. (b)

the personal estate was to be paid to the personal representative of W. J. the elder; one other third part to Jarrold and wife, in right of the latter; and the remaining third part to J. Johnson. The unsold real estate was directed to be sold; and it was declared, that one sixth part of the proceeds belonged to Elizabeth Hastings [the personal representative of W. Johnson the son], and that the remaining five sixth parts thereof belonged to the testator's heir-at-law. — Reg. Lib. The above small additions between brackets in the text, are from the same source.

(b) See *Fletcher v. Ashburner*, 1 Bro. C. C. 502, 503, and note (a), and cases cited; *Ackroyd v. Smithson*, 1 Bro. C. C. 503, 514, 515, and note (b), and cases cited.

KNOX v. SIMMONDS.

[Vide S. C. 1 Ves. jun. 389.] Lincoln's-Inn-Hall, 6th August.

(1)

The submission to an award was, that it should be made on or before the first day of Michaelmas term: the time was enlarged till the first day of Hilary term. The award was made on the first day of Hilary term: it is good, and the word "till" is for this purpose inclusive. (2) Where there is a non-performance of an award, the proper motion is that the party may stand committed; not for an attachment; but the notice of motion must be served personally.

THIS was a bill filed to be discharged from a purchase, to a very considerable amount, on account of the value of the estate being very inferior to the price agreed to be paid, by means of gross misrepresentations on the part of the vendor, and his agents.

*As the articles stated to be misrepresented were very numerous, [359] and the evidence from which the misrepresentation was to be gathered was very long and complicated, it was agreed by the parties to refer it to arbitration: it was accordingly referred, and a submission entered into by the parties, to the award which should be made; but the submission did not contain the words, "and undertake to perform," and the award was to be made on or before the first day of Michaelmas term.

The parties went before the arbitrator; and the matter taking a great deal of time, the time for making the award was enlarged, upon motion in Michaelmas term, by consent, till the first day of Hilary term.

The arbitrator, finding several articles of the purchase rated at too high a value, but that, on the other hand, several articles were thrown in, and no price charged for them, by which, upon the whole, the purchase was not overrated, confirmed the purchase; but directed the purchase-money to be paid by instalments.

The time for payment of the first instalment being past, and the money not paid, two motions were made; one on the part of the plaintiff, to set aside the award; the other on the part of the defendant for an attachment for non-performance of the award.

The two motions came on together, on the 20th June last.

Mr. Solicitor-General, Mr. Mansfield, and Mr. Hollist, supported their

(1) There is no entry in R. L. as upon this occasion; but the award was made an order of court on the 31st of October following. — R. L. 1790, A. fol. 618, et seq.

(2) Vide *Rex v. Stevens*, 5 East, 244, et seq.

motion for setting aside the award, on two grounds; 1st. That the award was formally defective, it not having been made in due time, by which means the arbitrator's authority was gone. The award, at first, was to have been made on or before the first day of Michaelmas term; the enlarged time was, until the first day of Hilary term, which is exclusive of the day on which the award was made; the award, therefore, was void; all the cases hold the word *till* to be exclusive of the day. *Nicholls v. Ramsey*, 2 Mod. 280, was a release of all actions till 26th April; this was held to be no bar to an action upon a bond dated on that day. So in *Bligh v. Trefrey*, Palm. 531, where it was from Michaelmas 1 Charles, to Michaelmas 2 Charles; and it was argued there could not be [*360] two Michaelmas days in one year. **Newman v. Beaumont*, Owen, 50. Second, (3) upon the ground of a mistake in the arbitrator, who ought not to have set the articles in the purchase, which were thrown in, against the overcharge in the other parcels. This they argued at great length, from the particular circumstances of the case; and said, that the mistake of the arbitrator, either in matter of fact or of law, was a good reason for setting aside the award, (3) as appears by the case of *Ridout v. Paine*, 3 Atk. 494, although no bill will lie against the arbitrator, but only against the party in whose favor the award is made. 3 Atk. 644.

Mr. Attorney-General, and Mr. Douglas, for the defendant, in support of the award, said, upon the formal objection, that the order for enlarging the time merely meant to substitute the second day named for the first; that is, the first day of Hilary term, for the first day of Michaelmas term; a mere erasure of the former, and an insertion of the latter. As an award, therefore, bearing date on the first day of Michaelmas term would have been undoubtedly good, so is the award bearing date the first day of Hilary. The word *until* is inclusive or exclusive, according to the nature of the case: where it is *until* the delivery of the deed, it is exclusive; but, where it is to a time to come, it is inclusive of the day named. It is like the word *from*, which has been held to be either inclusive or exclusive. In *Pugh v. The Duke of Leeds*, Cowp. 715, the word *from* was held to include the day of the date of the leases. Lord Mansfield there pronounced a very solemn judgment; and if this is so in respect to the *terminus a quo*, the construction must be the same as to the *terminus ad quem*. If the word is at all equivocal, the construction which will substantiate the act of the party must prevail. But there are other cases, especially those on the poor laws, in which, in order to support the settlement, the word *until* has been held to be inclusive; as, *The King v. Navestock*, Burrow's Settl. Cases, 719; Bott, 387; *The King v. Syderstone*, Caldecott Cas. 19; *The King v. Skiplam*, Mich. 27 Geo. 3; 1 Durnford and East, 490.

They also went at large into the subject of the second objection, and argued that the award was proper, and ought not to be set aside. (3)

Mr. Solicitor-General, in reply, admitted, that the word *until* is inclusive or exclusive, according to the subject; but that it is naturally [*361] *exclusive, appears from 6 Co. 94 b.: this is illustrated by the

(3) See the report in 1 Ves. jun. 369, et per Lord Eldon C., 18 Ves. 449. His Lordship there says, "The rule as to mistake is, that where there is clear and distinct evidence of mistake, the nature of it, and that it was made out to the satisfaction of the arbitrators, as to which Lord Thurlow insisted on having their affidavit, courts both of law and equity will interpose; the one by setting aside the award, the other by refusing to make it a rule of court."

cases from the poor laws, where, it being necessary that there should be a service for a year to obtain the settlement, the word has been held inclusive for that purpose. In the case of *Pugh* and *The Duke of Leeds*, the authorities cited would hardly maintain the position; but the principle will bear it out, by a presumption that the lease was executed the last moment of the day. With respect to arbitrations at *nisi prius*, it is always held exclusive.

2. If the arbitrator has made a clear mistake of the law, the award must be set aside. Whether the Court set aside the award or not, it is discretionary whether it will grant an attachment.

LORD CHANCELLOR said, he thought it impossible to impeach the award in this way: that it was an enlargement of the time *in statu quo*, and, therefore, must include the first day of Hilary term; (a) and being satisfied with the award, upon the circumstances of the case, he ordered it to stand. (b)

The motion for the attachment stood over, and was afterwards waived, and this day

Mr. *Attorney-General* moved, that the plaintiff might stand committed for non-performance of the award.

The notice of motion had been given to the clerk in court, not to the plaintiff personally.

LORD CHANCELLOR said he had inquired into the practice, and that this was the proper motion, not a motion for an attachment; that he had copies of many submissions; that it was true they contained the words, "and undertake to perform;" but if a submission was by parol, it would amount to a promise to perform, upon which an action would lie.

But the service of notice must be personal, not on the clerk in court; the cause being, by the reference, out of court.

But on service of a writ of execution of the order, and personal service of notice of motion, a motion for an attachment might be made, though there was no submission to perform the award, or the submission was not made a rule of court. (c)

(a) Kyd on Awards (Am. ed.), 137, 138. As to the time when awards should be returned, see 1 Metcalf & Perkins's Dig. Tit. Arb. and Award, § 3 (a); 2 Smith, Ch. Pr. (Am. ed.) 419.

[The question, whether the word *until* should be construed exclusive or inclusive of the day to which it is applied, was very elaborately discussed, in *The King v. Stevens*, 6 East, 244. It was contended, that it must be considered as exclusive, upon the authority of *Nicholls v. Ramsden*, 2 Mod. 280, and *Newman v. Beaumont*, Owen, 50, and by analogy to the word *unto*, which, in *The King v. Gamlingay*, 3 T. R. 513, was holden to be exclusive of place. The Court, however, upon the ground that the words *to*, *from*, *until*, &c. were evidently used by writers both in an inclusive and exclusive sense; that if the word *until* had occurred in a contract, and the context or subject-matter showed that it was meant in an inclusive sense, in furtherance of such intention, it would be so construed: accordingly in that case (which was upon an indictment), determined that *until* might be construed either exclusive or inclusive of the day to which it is applied, according to the context and subject-matter. — *Eden*.]

(b) His Lordship's reasons, upon the second point, are given at length in Mr. Vesey's report: they are in part to the effect so frequently alluded to upon this doctrine, that in case of mistake, it must be made out to the satisfaction of the arbitrator; and the party must convince him that his judgment was influenced by that mistake, and that if it had not happened, he should have made a different award: as to which it has been stated, that Lord Thurlow used to require the affidavit of the arbitrator, vide *Price v. Williams*, ante, 163, 1 Ves. jun. 365; *Morgan v. Mather*, 2 Ves. jun. 15; *Dick v. Milligan*, post, vol. iv. 117; 2 Ves. jun. 23; *Anderson v. Darcy*, 18 Ves. 449. — *Eden*.

(c) See Kyd on Awards (Am. ed.), 312, 313; 2 Smith, Ch. Pr. (Am. ed.) 435–438.

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*CAVIL [CABELL] v. SMITH.

Lincoln's-Inn-Hall, 6th August, [and 31st October.]

(Reg. Lib. 1790. A. fol. 617. b.)

Sequestrators ordered to sell the goods, where the party is in contempt for non-payment of money. (1)

THERE having been an order for the payment of money, and the party being in contempt for non-payment, (1) and a sequestration having issued, and goods being taken, the sequestrators were ordered to sell the goods, upon the motion of Mr. Richards.

(1) In which this differs from a sequestration on mesne process, which latter ought not indeed to be executed; serving only as a foundation for future proceedings. See, as to this, the Editor's note to *Hales v. Shafts*, *antea*, 72. As to cases to enforce payment of a duty decreed, &c., see references, *ibid*. *Dunkley v. Scribner*, 2 Madd. Rep. 443; *Walker v. Bell*, *ibid*. 21, et seq.; *Mitchell v. Draper*, 9 Ves. 298; { 1 *Smith*, Ch. Pr. (Am. ed.) 434, 435; 1 *Barbour*, Ch. Pr. B. 1, ch. 2, § 6, p. 68, 69, 72. }

HEYGATE v. ANNESLEY. Lincoln's-Inn-Hall, 8th August.

(Reg. Lib. 1790. A. fol. 504. b.)

Money ordered to be paid to husband in right of wife, a vested interest in him. (1)

A SUM of money having been ordered to be paid to the husband in right of his wife, he died before payment; and, upon the wife's application for the money, the executor submitted whether he was not, as such, entitled to it. Lord CHANCELLOR held it was a vested interest in the husband, and ordered it to be paid to the executor. (a)

(1) Vide *S. P. Forbes v. Phipps*, 1 Eden, Ca. Lord Northington, 502. A decree in equity being equal to a judgment at law, with regard to personal property. Et vide per Lord Hardwicke, C., 1 Ves. 214; *Oglander v. Baston*, 1 Vern. 396, cited *ibid*. 507, determined also that the husband was entitled equally after an award; "which," the Lord Chancellor said, was "a sort of judgment." See further, Mr. Roper's *Modern Treatise on Bar. & Feme*, 2d volume.

(a) See *Clancy*, *Rights of Women*, ch. 8, p. 116, 117; *Forbes v. Phipps*, 1 Eden, 502.

If there be a decree in equity in favor of husband and wife, and the husband dies, the decree will survive to the wife, though her name might not have been necessarily joined in the proceedings. *Mase v. Edgerton*, C. W. Dud. Eq. 179.

[At law, the wife's choses in action, not reduced into possession by the husband, survive to her, and her equitable interests in the same case do so in equity. So her terms of years, and other chattels real, which are in possession already, and do not lie in action, will survive, if no act is done by him: but he may assign them at law, with or without consideration, and the analogy is followed in equity. *Lord Carteret v. Paschall*, 3 P. W. 197; *Mitford v. Mitford*, 9 Ves. 98. But here the analogy stops, for, in strictness, as observed by Sir William Grant, (ib.) equitable interests of the nature of choses in action, ought not to be affected by the husband's assignment; choses in action not being assignable at law: in equity, however, a distinction has been made between a voluntary assignment, and an assignment for valuable consideration: the wife surviving, being bound by the latter, not by his voluntary assignment. *Burnet v. Kynaston*, 2 Vern. 401; *Lord Carteret v. Paschall*, *sup.*; *Bates v. Dandy*, 2 Atk. 207; *Mitford v. Mitford*, *sup.* { *Saddington v. Kinsman*, 1 Bro. C. C. 44, note (1) and cases cited, 51, notes (a) and (b). }

What other acts of the husband, besides assignment for valuable consideration, shall be considered sufficient to reduce her choses in action into possession, is a question which has given rise to several cases. { See *Wardlaw v. Grey*, 2 Hill, Ch. 651; *Ryland v. Smith*, 1 Mylne & Craig, 53; *Snowhill v. Snowhill*, 1 Green, Ch. 30; *Walker v. May*, 1 Bai. Eq. 58. } Filing a bill in equity will not have this effect. *Anon.* 3 Atk. 726. Nor an agreement between the husband and wife, for settling the chose in action, if he die previous

to the completion of the agreement. *Fort v. Fort*, Forr. 171. Nor an admission to the husband by an executor, and an appropriation for the purpose of payment. *Blount v. Bestland*, 5 Ves. 515. Nor a transfer by an administrator of a share under an intestacy to the wife's separate use, in her name. *Wildman v. Wildman*, 9 Ves. 174. See also *Nash v. Nash*, 2 Mad. Rep. 133. Nor the general assignment in bankruptcy, *Mitford v. Mitford*, cit. sup., overruling *Pringle v. Hodgson*, 3 Ves. 619. Nor the assignment under the insolvent acts, *Horsby v. Lee*, 2 Mad. Rep. 16.

In a case in *Aleyn*, 36, cited by Lord Hardwicke, in *Garforth v. Bradley*, 2 Ves. 675, it is said that the husband's bringing an action in his own name, and obtaining judgment, will prevent its surviving: but Lord Cowper, in *Packer v. Wyndham*, Prec. Chan. 415, and Lord Hardwicke, in *Bond v. Simmons*, 3 Atk. 20, considered that it would not have that effect if he died before execution; therefore the determination of Lord Jeffries, in *Oglander v. Baston*, 1 Vern. 396, that a sum of money awarded to the husband was in the nature of a judgment, and had changed the property, though relied upon by Lord Northington, in *Forbes v. Phipps*, cit. ante, seems extremely doubtful. This also renders it questionable how far a decree of a court of equity would of itself have this effect: though equal in extent and operation to a judgment at law (*Morrice v. The Bank of England*, Forr. 217), it does not appear to be superior to it; and as observed by Sir W. Grant, in *Richards v. Chambers*, 10 Ves. 587, a decree or judgment of a Court does not pass property, but merely declares the right existing by antecedent title and disposition. This however is clear, that where the money had been paid into Court under a decree for the husband to propose a settlement, such payment could not give him the absolute interest in the property. *Bond v. Simmons*, cit. sup.; *Macaulay v. Philips*, 4 Ves. 15. The determination in *Packer v. Wyndham*, sup. in opposition to this, being obviously incorrect.

Mr. Clancy, in his valuable *Essay upon the Rights of Married Women*, 359, suggests that these cases have shaken the authority of Lord Northington's decision in *Forbes v. Phipps*: and whenever the question comes to be reconsidered, it certainly will be open to discussion, whether the direction contained in the decree for payment, like the order in the present case, changed the property and vested it in the husband, or left it, as in the case of a judgment at law, where the husband dies before execution. Such a case, however, is widely different from those of *Bond v. Simmons*, and *Macaulay v. Philips*, where it was expressly said, that the payment into Court did not change the property: the Court thereby merely substituting itself for the trustee. Taking the fund into its hand, and exercising its usual equity, it refuses to pay out that fund, except upon the condition mentioned in the order, which, to use the language of the counsel in *Packer v. Wyndham*, is in the nature of a condition precedent: and the husband, not having performed his part thereof, has no title to the fortune. But in the other case, the Court not exercising any control over the fund, declares the rights of the parties and orders payment. The whole transaction is completed; in which respect it differs from a judgment at law, where an ulterior step must be taken by the party recovering to make it operate against the thing recovered, viz. suing out a writ of execution.

It may be here noticed, that an error has crept into the marginal abstract of the above-cited case of *Forbes v. Phipps*, it being printed "that her share vested absolutely in the husband by survivorship," instead of, "by the decree." — *Eden.*]

CRESWELL v. BYRON. (2) Lincoln's-Inn-Hall, 9th August.

(Reg. Lib. 1790. A. fol. 515. b.)

Leasehold estate, settled "in lieu of dower," is not a bar of thirds. (1)

A LEASEHOLD estate was settled (previous to marriage) upon the wife, "in recompense and bar of dower, and for a provision for the wife;" the husband had no real estate; and the question was, whether this was a bar to the wife's claim of thirds. Lord CHANCELLOR held it was not. (2)

(1) Vide *Tinney v. Tinney*, 3 Atk. 8, the notes to *Pearson v. Pearson*, ante, 1 vol. 292, and to *Foster v. Cook*, ante, 347; { *Caruthers v. Caruthers*, 4 Bro. C. C. 500. }

(2) The nature of the case before the Court did not admit of any declaration upon its record upon this occasion. Vide R. L.

Ex parte BATSON and Others, in the Matter of GOOCH and
COTTON, Bankrupts.

[Vide S. C. Cooke, B. L. 334 (6th ed.), and [346,] preceding ed.] Lincoln's-
Inn-Hall, 10th August.

Mortgage of a ship in the port of Dublin, and delivery of muniments, the mortgagee insured her there and made a second mortgage; the second mortgagee took possession as soon as he was informed she was in an English port: this is a sufficient possession to take it out of the statute of 21 Jac. c. 19. (1)

By indenture, bearing date 20th August, 1783, Gooch and Cotton assigned to Lindegreen and Co. (among other things) by way of [*363] mortgage, the ship *Nautilus*, together with all *deeds, &c. as a security for several sums of money then due, or which, in the course of their trade, should become due from Gooch and Cotton to Lindegreen and Co.

By indentures of lease and release of the 17th and 18th September, 1783, reciting the said indenture, Lindegreen and Co. assigned the said ship (among other things) to the petitioners, by way of mortgage, as a security for sums of money then due to them.

On the 7th October, 1783, a commission was issued against Lindegreen and Co. and on the 4th October, 1783, a commission was issued against Gooch and Cotton.

At the time of the mortgage made by Gooch and Cotton to Lindegreen and Co. (20th August, 1783), the ship *Nautilus* was at Dublin, where she remained till the 14th September, when she sailed for Cadiz, from whence she returned to Great Yarmouth. No actual possession was given of her by Gooch and Cotton to Lindegreen and Co., but an insurance was made by them, 19th August, for twelve months. On the 9th October, 1783, Gooch and Cotton were served with notice of the ships (of which the *Nautilus* was one), with their bills of sale, being assigned by Lindegreen and Co. to the petitioners. In March, 1784, the petitioners had notice of the *Nautilus* having arrived at Great Yarmouth; and on the 1st April gave authority to their solicitors, in writing, to take possession, and, on the 5th of April, possession was taken of the ship for the petitioners, and the master signed a memorandum, by which he declared that he kept possession for them. The ship had been since sold.

The prayer of the petition was, that the right of the petitioners to the ship, and the money arising therefrom, might be declared and established to them.

Mr. *Mansfield*, and Mr. *Cooke*, for the petitioners, contended that this ship was not left in possession of the bankrupts, within the meaning of the clause 21 James, c. 19. 11, "that if any persons at the time they become bankrupts, shall, by the consent of the true owner, have in their possession, order, and disposition, goods, whereof they shall *be reputed owners*, the commissioners shall have power to sell the same." [*364] That here was a sufficient *delivery to the petitioners to take the case out of the statute. There was, in fact, all the delivery the nature of the property admitted. Where a ship is beyond sea, the delivery of the muniments is a sufficient giving possession. This has been held to be so where the ship is at sea. It is the same thing, if she is in a foreign

(1) See Cooke, B. L. 349, et seq. (6th ed.) (342), preceding ed.; *Brown v. Heathcote*, 1 Atk. 160, &c.

port, *Brown v. Heathcote*, 1 Atk. 160. The party must have time to send out to take possession, if actual possession is necessary, *Atkinson v. Mailing*, 2 Term Rep. 462. Here possession was taken as soon as she arrived in an English port.

Mr. *Solicitor-General*, and Mr. *Campbell*, for the assignees. The ship continued at Dublin from the 20th of August to the 1st of September; during that time possession might have been taken. It was incumbent on *Lindgreen and Co.*, under whom the petitioners claim, to do all they could to get possession of the ship; they ought, at least, to have given notice to the master. The only reason why ships are not within the general rule, is from the impossibility, when they are at sea, of giving possession. It is upon this ground that it was put, by Justices *Ashhurst* and *Buller*, in the case in the Term Reports. In *Ex parte Matthews*, 2 Vesey, 272, it is said, a mortgage may be made of a ship at sea, but the mortgagee must take all the methods in his power to get possession. Here there was a month, during which possession might have been obtained, by putting a person on board, or giving notice to the master; for which, they might have obtained a warrant from the mortgagors.

LORD CHANCELLOR. If the ship had been chartered from Dublin to Cadiz, with liberty to touch at a port in England, has it ever been held that the mortgagee was bound to give notice? If there had been a new voyage commenced under the authority of *Gooch and Cotton*, that would have made the case different; here the insurance was for a voyage beginning from Dublin. When the ship is chartered, and the voyage begun, it would be difficult to take possession. A notice to the captain would be to stop the voyage.

His Lordship granted the prayer of the petition. (a)

(a) See *Falkener v. Case*, 1 Bro. C. C. 127, note (b), and cases cited; *Brinley v. Spring*, 7 Greenl. 241; *Joy v. Sears*, 9 Pick. 4; *Gardner v. Howland*, 2 Pick. 602; *Turner v. Coolidge*, 2 Metcalf, 350; *Carter v. Willard*, 19 Pick. 9.

[The transfer or mortgage of a ship or cargo at sea, is generally made by an assignment of the bills of lading, &c.; but a bill of lading is by no means a necessary instrument for the transfer of property in goods consigned to the owner. If the best delivery is given that the nature of the case will admit of, it will take it out of the statute. *Brown v. Heathcote*, 1 Atk. 160; *Ex parte Matthews*, 2 Ves. 272; *Gillespy v. Coutts*, Amb. 652; *Atkinson v. Mailing*, 2 T. R. 464; *Ex parte Stadgroom*, 1 Ves. jun. 163; 2 Cox, 234; *Manton v. Moore*, 7 T. R. 67; *Jones v. Dwyer*, 15 East, 21; *Meyer v. Sharpe*, 5 Taunt. 74. But the delivery of the grand bill of sale will not be sufficient, if there has been an opportunity of taking possession. *Ex parte Matthews*, cited ante, *Hall v. Gurney*, Co. B. L. 333. If no documents exist, the party to whom the ship or goods are assigned over, should be ready at the spot where the ship is expected to arrive, in order to be ready to take immediate possession. *Philpot v. Williams*, 2 Eden, 221. — *Eden*.]

See also *Peters v. Ballister*, 3 Pick. 493; *Pratt v. Parkman*, 24 Pick. 46, 47; *Gallop v. Newman*, 7 Pick. 283; *Falkener v. Case*, 1 Bro. C. C. 127, note (b).

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*MICHAELMAS TERM.

32 Geo. 3. 1791.

RIGGE v. BOWATER.

Receiver.

LORD CHANCELLOR intimated his opinion (without deciding the case) that if a receiver be appointed by the Court (upon the application of a mortgagee or other incumbrancer), and he afterwards embezzle or otherwise waste the rents and profits, the loss must fall on the mortgagor. (a)

(a) Where a loss happens by the default of a trustee appointed by the testator, the estate is discharged from it. *Carter v. Barnardiston*, 1 P. W. 519, citing *Anon.* 1 Salk. 163. So where a trustee was appointed by creditors to receive rents for the payment of debts, a loss arising from the failure of the trustee was directed to be borne by the creditors, and the estate was discharged from it. The present case being held not to apply. *Hutchinson v. Lord Massareene*, 2 Ba. & Be. 49. — *Eden*.

{ 2 Madd. Ch. Pr. (4th Am. ed.) 235. }

PARSONS v. NEVILLE.

All residuary devisees must be parties. (1)

BILL by some of the residuary devisees, on behalf of themselves and the other devisees.

By Lord CHANCELLOR, all the devisees must be parties. (1)

(1) Lord Thurlow determined "that the general principle requires a residuary legatee to bring before the Court all persons interested in the residue; but that admits of an exception, where it is not necessary or convenient [in point of justice]." Per Lord Eldon C., 15 Ves. 328. Vide *Sheritt v. Birch*, ante, 229, and the Editor's note. { See *Queensberry v. Cullen*, 1 Bro. C. C. 101, and notes; *Lawson v. Barker*, ib. 303; also *Morse v. Sadler*, 1 Cox, 352. }

STRANGE v. HARRIS, Executor.

[Present practice to order] payment of money into Court upon admission in the defendant's answer (1), &c.

THE Court will now, immediately upon coming in of defendant's answer, order so much as he admits to have in his hands of the testator's property to be paid into the bank. (a) It was formerly thought necessary for the plaintiff to show that the executor had abused his trust, or that the fund was in danger from the insolvent circumstances of the executor. (1)

(1) See also per Lord Redesdale C., *Blake v. Blake*, 2 Scho. & Lefroy, 26.

(a) 1 Smith, Ch. Pr. (Am. ed.) ch. 24, p. 667; 2 Madd. Ch. Pr. (4th Am. ed.) 399, 400; 1 Barbour, Ch. Pr. B. 1, ch. 7, § 5, p. 237, et seq.; *Rothwell v. Rothwell*, 2 Sim. & Stu. 217; *Clarkson v. De Peyster*, Hopk. 274; *Blake v. Blake*, 2 Sch. & Lef. 26; 1 Hoff. Ch. Pr. ch. 9, § 5, p. 319, et seq.; *Rutherford v. Dawson*, 2 Ba. & Be. 17; *Hare v. Harrison*, 2 Cox, 377; *Roberts v. Hartley*, 1 Bro. C. C. 57.

***LIKE and Others v. BERESFORD and Others.** 14th Nov. [*366]

Court will not, upon motion, make an order which will decide the merits of the cause. [An order embracing the whole object of the suit cannot be made on motion without express consent. Notice to the other parties is not sufficient if they do not attend. Note.]

BILL by plaintiffs, creditors of the defendant Beresford, on behalf of themselves and other creditors, claiming to be entitled, under an assignment from him, for the benefit of plaintiffs, and other creditors, of all his right to and in funds in court, the property of his wife(1) (formerly Miss Hamilton). A suit had been instituted [in the year 1780] by the wife's trustees, and the usual order had been made, for Mr. Beresford to lay proposals for a settlement before the Master; and the assignment was pending the reference. The consideration of it was, necessities supplied, and money lent, by which both the husband and wife had been for some time supported. The husband consented to settle the whole fund to the wife's separate use, and the settlement was accordingly made, and the funds transferred to the trustees. (1)

The bill impeached this settlement as fraudulent, and particularly insisted on the husband's right in the dividends which had accrued during the coverture, and the plaintiff's right to the same by virtue of the assignment; and, therefore, prayed, that the funds, and particularly the dividends, might be declared to be subject to their claim, and that the trustees might not part with them, or proceed upon the trusts of the settlement.

Mr. Beresford (1) moved that the trustees might be directed to pay the dividends to him. (2) The plaintiffs had notice of motion, but did not appear.

Lord CHANCELLOR was of opinion, that even with (1) the plaintiff's consent he could not make any order, the object of the motion involving the principal point in the cause. (a)

(1) See the several circumstances more particularly stated in the report of the case on the hearing upon the bill filed by the creditors, 3 Ves. 506, et seq., when it was dismissed.

(2) This report is incorrect as to the nature of the present application, and also (it seems) as to the above dictum. Lord Colchester's MSS. contain an accurate statement of it, from the notes of Mr. Le Mesurier; which is as follows:—

Like v. Beresford, in Chancery, Mich. T. 32 Geo. 3, 1791. — The case was, that defendant Beresford married Miss Hamilton, a minor, upon which the trustees of her fortune filed a bill in this Court, for the purpose of securing her a settlement out of the fund. The cause coming on to be heard, the usual order was made for a reference to the Master, to receive proposals from the defendant Beresford, for a settlement, who made several, which were disapproved by the Master. Pending this, Mr. Beresford made an assignment of the whole of the fortune to plaintiffs, in trust, to pay them and the rest of his creditors. Afterwards Mr. B. agreed to settle the whole of Mrs. B.'s fortune, so that the dividends should be paid to her during her life; afterwards, in case there should be any children, half of the dividends to be paid to Mr. Beresford, and the other half to go to the maintenance of the children, &c.

The creditors on this filed their bill, impeaching the settlement as fraudulent as against them, to the extent of their demand, and praying that they might be paid, in the first place, out of the fund. The amount of the debts was not more than 700*l*. Mrs. B.'s fortune was 4000*l*. bank-stock. And now

Stanley moved, on behalf of Mrs. B., that the dividends might be paid to her during the continuance of the suit. Notice was given to the plaintiffs, the creditors, but they did not appear. It was argued, that, as the fund was so much more considerable than the demand, no prejudice could arise from granting this motion.

But the Chancellor was of opinion, that, without the express consent of all parties, he would not make an order like this, which embraced the whole object of the bill, and so Motion refused.

The bill so filed by the creditors was afterwards dismissed at the hearing. Vide 3 Ves. 506.

(a) See 1 Smith, Ch. Pr. (Am. ed.) 62.

[*367] *WEEDEN BUTLER and CAREW ELERS, Plaintiffs.
 ROBERT CAMPION STRATTON, (1) JOHN STRATTON, an Infant (by
 PETER WOODHEAD, his Guardian), FRANCIS PATTERSON, SARAH
 PATTERSON, ANN PATTERSON, and THOMAS PATTERSON, Infants
 (by ZACHARY PHILLIPS, their Guardian), FRANCIS FAIRBANK,
 WILLIAM FAIRBANK, and ANN FAIRBANK, an Infant (by WIL-
 LIAM DYER, her Guardian), ELIZABETH FAIRBANK, and MARY
 FAIRBANK, Infants (by JAMES DRIVER, their Guardian), JOHN
 PEARCE, GEORGE PENLEAZE, and ELIZABETH, his Wife, ROBERT
 SHAW, THOMAS ROGERS, and ELIZABETH, his Wife, THOMAS
 PERKINS, and JOHN MURPHY, and ANN, his Wife, THOMAS
 JACKSON, and GEORGE LANGDALE, Defendants.

[23d November.]

(Reg. Lib. 1791. A. fol. 40. b.)

Legacy "to A. and B. the children of C. equally," they take *per capita*. (2) Legacy "to the descendants of A. and B. equally," all descendants (children and grand-children) take *per capita*. (2)

REBECCA STRATTON made her will as follows; "I give, devise, and bequeath unto the said Weeden Butler, Carew Elers, and the survivor of them, and his heirs, all those my said three freehold messuages or tenements, with all and singular the rights, members, and appurtenances to the same belonging, or in any wise appertaining, as the same are situate in Coleman Street, London, aforesaid, and are now in the occupation of Charles Leader, his under tenants or assigns, in trust to sell the same, and the clear money arising by such sale to pay and divide *equally* between Robert Campion Stratton, of Cole-Stairs, Shadwell, lighterman, grandson of William Stratton, late of Whitecross Street, in the county of Middlesex, victualler, John Stratton, of Deptford, in the county of Kent, son of Thomas Stratton, shipwright, deceased, and the children of Mary Patterson, wife of — Patterson, of Wendover, in the county of Bucks, and as to all the rest and residue of my freehold and personal estates, of what nature or kind soever, or wheresoever, I give, devise, and bequeath the same unto the said Weeden Butler, and Carew Elers, and the survivor of them, and his heirs, executors, or administrators, in trust to sell the [*368] *real estates, and the money arising clearly therefrom, together with the personal, to divide *equally* between the descendants of Thomas Fairbank, formerly of Marston, in the county of York, gentleman, deceased."

The testatrix died 9th March, 1778, whereupon the trustees and executors filed their bill to have the necessary accounts taken, and the rights of the parties declared.

Upon the first hearing, 11th February, 1790, it was referred to the Master, to inquire who were the children of Elizabeth (by mistake in the will called Mary) Patterson, and who were the descendants of Thomas

(1) This report was copied verbatim from the notes of Lord Colchester, who was of counsel in the cause. — Editor.

(2) Vide *Davenport v. Hanbury*, and *Horsepool v. Watson*, 3 Ves. 257, 383; *Blackler v. Webb*, 2 Cox, P. W. 383, 385, note; *Malcolm v. Martin*, ante, 50; *Phillips v. Garth*, ante, 64; *Rayner v. Mowbray*, ante, 234, with the Editor's notes; *Smith v. Campbell*, 19 Ves. 400, &c.

Fairbank, at the time of the testatrix's death, and what real estates passed by the testatrix's will, and to whom.

The Master, by his report, 2d August, 1791, stated that there were four children of Elizabeth Patterson alive at testatrix's death, and still living, and that the Strattons claimed to divide the produce of the Coleman Street estate with the Pattersons *per stirpes*, whereas the Pattersons insisted on dividing it *per capita*. Also he certified, that at testator's death there were living three sons of Thomas Fairbank, and eleven grandchildren.

Mr. Abbot, for the Pattersons. We claim to divide this fund *per capita*, in one sixths, and not in one thirds. 1st. Because the right of representation is no primary rule for construing the intention, but only a technical rule of distribution for intestates. In 1 P. Wms. 340, *Northey v. Strange*, it was said, the children take not by representation. So 2 P. Wms. 383, *Blackler v. Webb*, they take as if named individually. So 2 Vern. 705, *Weld v. Bradbury*, they take as claiming in their own right, and not as representing parents.

But, 2dly, Even if they would, otherwise, take by representation, the word "*equally*," applied even to the next of kin, or relations under the statute of distribution, causes a division *per capita*. *Thomas v. Hole*, C. T. T. 251; *Green v. Howard* (ante, 1 vol. p. 31); *Phillips v. Garth* (ante, 61).

Mr. Mitford, *contra*, for the Strattons, attempted to distinguish these cases; but Lord Chancellor thought there was no room for it.

*Mr. Steele (for the sons of Thomas Fairbank) argued, 1. That [*369] the legacy to the descendants of Thomas Fairbank means those, who, at the time of taking, would be entitled by the statute of distribution; for the word "relations" had been always so confined, though no case is to be found as to "descendants." In *Crossley v. Clare*, stated in the note to *Pierson v. Garnet* (ante, v. ii. p. 228, n.), Sir Thomas Clarke seems to have said, that descendants are equivalent to heirs of real estate, and so equivalent to the next of kin of personal estate: but Mr. Ambler, in his report of the same case, p. 397, gives a different account of Sir T. Clarke's language.

Mr. Solicitor-General (for the grandchildren of Thomas Fairbank) argued, 1. That the word "descendants" includes more remote descendants than those within the statute; 2. That they must take *per capita*. On the first point there is no decision to confine "descendants" to the same sense as "relations."

Lord CHANCELLOR. It does not go on the same principle.

Mr. Solicitor-General. The meaning of *relations* is confined, for convenience sake. Sir T. Clarke says, in Ambler, a devise to descendants would be good, and excludes the grandchildren, only because born after the will, the devise being to those now living, i. e. at the time of the will.

Lord CHANCELLOR. Sir Thomas Clarke must, on his own principle, mean to divide *per capita*.

Mr. Solicitor-General. In *Pierson v. Garnet* (ante, v. ii. p. 38, and 226), this Court said, as the Master of the Rolls had said before, that a gift to descendants means to limit it to such relations as are descendants; but Mr. Pierson being still alive, it was not necessary in that case, then, to decide whether *per capita* or not.

The second point. Also, if "descendants" are equivalent to "relations," or to be construed in the same way, then, by the case of *Thomas*

v. *Hole*, "equally" will have the effect of making them take *per capita*. Fort. 251. So *Green v. Howard* (ante, vol. i. p. 31). So *Blackler v. Webb*, 2 P. Wms. 383.

[*370] *LORD CHANCELLOR. Between the Strattons and Pattersons the legacy must be divided *per capita*; and all Fairbank's descendants must take, as well grandchildren as children, and all *per capita*. (a)

(a) See *Phillips v. Garth*, ante, 64, 69, 70, and notes; 2 Williams, Ex. Pt. 3, B. 3, ch. 2, § 2, p. 729.

SANDFORD v. PAUL. [Vide S. C. 1 Ves. jun. 398, and 2 Dick. 750.]

(Reg. Lib. 1791. B. fol. 45. b.)

Witness re-examined [after decree, there having been a mistake, from his having had a partial release previously to his first examination, instead of a general one; which had been executed subsequently.] (1)

MR. MANSFIELD moved, that a witness, who had been examined in chief, might be re-examined before the Master; suggesting, that at his first examination he was interested, having executed a partial release instead of a general one.

MR. SOLICITOR-GENERAL opposed the motion, upon the ground of the great inconvenience that might result from such a practice; as, by this means, having got from a witness what he knew, he might be tampered with afterwards to amend his evidence.

LORD CHANCELLOR granted the motion, founding himself upon this being a special application, and upon special grounds, the mistake and accident which had happened, by which the witness had executed a partial, instead of a general, release. (a)

(1) See the report, 1 Ves. jun. 498, which is more full, and S. C. 2 Dick. 750. Et vide *Sawyer v. Bowyer*, ante, 1 vol. 388, with the Editor's notes; and *Smith v. Althus*, 11 Ves. 564, especially the reference to 2 Merivale, 81, S. P. A witness, who has not been examined before a decree, may be examined before the Master after it, without an order, although the party who examines him, entered into no proof before the hearing. Vide *Hough v. Williams*, ante, 190, &c.

(a) See 2 Smith, Ch. Pr. (Am. ed.) 142, 143, 144; 2 Madd. Ch. Pr. (4th Am. ed.) 413, 414.

SHERMAN v. SHERMAN.

(No Entry.)

[Writ of *ne exeat regno* refused, the affidavit amounting to no more than suspicion of the party's intention, and no precise sum sworn to as due.] (1)

MR. HOLLIST moved for a *ne exeat regno* against the defendant, who was sued as an administratrix. The affidavits stated threats of absconding and of embezzling the effects of the testator, which might, according to general computation, be worth about 2000*l*.

(1) In any matter of account the Court holds it sufficient, if the party swears that, "according to the best of his belief," any particular sum [at the least] would be found justly due to him upon a balance, when the account is taken. See *Beames on Ne Exeat*, 23. See like-

He cited 2 Ventris, 345. (2)

Lord CHANCELLOR refused the motion, considering the affidavits as too loose, and that no sum was positively sworn to, (1) so that there was no precise sum for which the writ could be marked; (a) also that there was not sufficient ground stated for the suggestion, that the defendant was going abroad. (1) (b)

wise, *ibid.* 22, 25, 36, as to the necessity of showing that the defendant has either actually threatened to leave the kingdom, or making such an event evident from actual facts, unless the Court interpose to prevent it. And see *Collinson v. Mair*, 18 Ves. 353, reported since Mr. Beames's book was published, and cases there cited.

The Editor is in possession of two MS. notes of the principal case, from the collections of Lord Colchester and Sir John Simeon. It appears that the bill only stated, that the defendant had received goods, &c. to the value of above 2000*l.*, and money to the amount of above 200*l.*; alleging a devastavit, but without claiming any definite balance as due. The affidavit stated that, "from the expressions used, the deponent doubted not the party's intention to go abroad." Lord Thurlow refused the application, as above; observing, that "the allegation of the party's having committed a devastavit would not do; since that was a ground to hold the party to bail in an action."

(1) See note (1) in the preceding page.

(2) His Lordship asked Mr. Hollist, "whether the order, in the case cited from Ventris, had been searched; since the notes in those cases were very short, and some of them not very accurate. Mr. Hollist replied, it had not been examined." From Lord Colchester's MSS.

(a) *Atkinson v. Leonard*, ante, 223, 224, and notes; *Flack v. Holm*, 1 Jac. & Walk. 405; *Mattocks v. Tremaine*, 3 John. Ch. 75; *Rhodes v. Cousins*, 6 Rand. 188; *Gibert v. Colt*, Hopk. 500; *Boehm v. Wood*, Tur. & Russ. 344; *Gernoe v. Bocaline*, 2 Wash. C. C. 130; 1 Barbour, Ch. Pr. B. 3, c. 6, § 2, p. 649, 650; *Thane v. Halsey*, 7 John. Ch. 193; 1 Hoff. Ch. Pr. ch. 2, § 8, p. 93-95, and notes; 1 Smith, Ch. Pr. (Am. ed.) 580, et seq.

(b) 1 Barbour, Ch. Pr. B. 3, c. 6, § 2, p. 649, 650; *Atkinson v. Leonard*, ante, 223, 224, and notes; 1 Hoff. Ch. Pr. ch. 2, § 8, p. 95, 96, and notes.

[Except where it is matter of pure account, the Court will not grant this writ upon an affidavit, stating merely information and belief, as to the amount of the debt. *Roddam v. Hetherington*, 5 Ves. 91; *Jones v. Sampson*, 8 Ves. 593; *Amsinck v. Barclay*, ib. 594; *Jackson v. Petrie*, 10 Ves. 164, and a mere affidavit of belief that the defendant is going abroad, is not sufficient; it must contain circumstances or declarations, showing the ground of such belief; but it will be sufficient to state that the debt will be endangered, without stating that it is to avoid the jurisdiction. *Oldham v. Oldham*, 7 Ves. 410; *Elches v. Lance*, ib. 417; *Hemming v. McEntire*, 11 Ves. 54; *Jones v. Alephsin*, 16 Ves. 470. See more upon this subject in *Atkinson v. Leonard*, ante, 218, and Mr. Beames's Brief View, 25, et seq. — *Eden.*]

*GREEN v. CHARNOCK. [S. C. 2 Cox, 284.] (1) [*371]

[A plaintiff is not compellable to give security for costs, unless he himself state that he is resident or going to reside abroad, or the fact be distinctly sworn to.] (2)

Mr. LLOYD, and Mr. *Richards*, had moved in the term, that all the proceedings might be stayed till the plaintiff had given the usual security,

(1) This report is verbatim from the note of Lord Colchester; and Mr. Cox's report (*ubi supra*) is from the same.

(2) The mere fact that a party is gone abroad, or is going abroad, is not sufficient. *Hoby v. Hitchcock*, 5 Ves. 699; < See *Phillips v. Thornton*, 10 Legal Obs. 134; *Gilbert v. Gilbert*, 2 Paige, 603; > and the Court will not make the order in other cases, where there are co-plaintiffs resident in England. *Walker v. Easterby*, 6 Ves. 612; nor if the defendant has obtained time to answer, or taken any other material step in the cause. *Anon.* 10 Ves. 287.

< If the non-residence of the plaintiff appears on the face of the bill, and the defendant demurs, pleads, or takes any other step in the cause, or even prays for time to answer, it is a waiver of his right to security for costs. *Goodrich v. Pendleton*, 3 John. Ch. 520.

Where the non-resident plaintiff sues as executor or administrator, the defendant cannot compel security for costs. *ib.*; *Cathcart v. Hewson*, 1 Hayes, 173. Especially after plea, 3 John. Ch. 520.

The plaintiff may be required to give security for costs at any stage of the suit, if he resides out of the jurisdiction at the commencement of the suit, and continues so. *Burgess v. Gregory*, 1 Edw. 449. >

And see, particularly, *Craig v. Bolton*, ante, 3 vol. 609, with the Editor's notes. < *Gow-*

to the two senior six clerks not towards the cause, for payment of costs, the plaintiff stating himself, by his bill, to be on a voyage to New York, in America, and they cited *Meliorucchy v. Meliorucchy*, 2 Vesey, 24.

Mr. *Solicitor-General*, and Mr. *Abbot*, for the plaintiff, insisted, that this was not sufficient to compel security for costs; as it ought, for that purpose, to appear that the plaintiff is resident, or going to reside, abroad, and that such was the rule laid down, Pract. Reg. 117 [Mr. Wyatt's edition, p. 146], analogous to the practice in the King's Bench. *Fitzgerald v. Whitmore*, 1 Term Reports, 362. Also that this being an injunction-suit, plaintiff would not be compellable, in the Exchequer, to give security, he being in a manner forced to come into equity by the action against him at law. *Fenwick v. Fortescue*, Bumb. 272.

Mr. *Richards* denied that the Exchequer practice was so at present.

Lord CHANCELLOR thought this was not sufficient evidence to the Court that the plaintiff was resident abroad; otherwise merely being at sea upon a fishing party, would be a reason to compel giving security.

The motion stood over, and, this day, the defendant produced an affidavit that the plaintiff was gone to reside in America.

Lord CHANCELLOR said, from the best inquiry he could make, the mere description in the bill was not sufficient evidence of the plaintiff's living abroad to call for security; (2) that the general rule is, that the plaintiff must appear to be resident abroad: and that he mentioned it now, that the general rule might be known. (a)

van v. Barnett, Sausse & S. 651; Wright v. Everard, ib. 651; Fisher v. Bunbury, ib. 625; Evelyn v. Chippendale, 9 Sim. 497. >
(2) See note (2) in the preceding page.

(a) See on the subject of security for costs of non-residents, and what residing abroad is sufficient to give the defendant a right to require it, 1 Smith, Ch. Pr. (Am. ed.) ch. 14, p. 555, et seq.; 2 Madd. Ch. Pr. (4th. Am. ed.) 270, et seq.; 1 Barbour, Ch. Pr. B. 1, ch. 6, § 1, p. 102, et seq.; 1 Hoff. Ch. Pr. ch. 7, sec. 3, p. 200, et seq.; Howe v. Harvey, 8 Paige, 73; Calvert v. Day, 2 Younge & Col. 217; Sandys v. Long, 7 Sim. 140; Shaw v. Dempsey, Sausse & S. 628; Fraser v. Palmer, 3 Younge & Col. 279; Howe v. Thompson, Sausse & S. 622; De Marneffe v. Jackson, 13 Price, 603.

[*372] *JORDAN v. SAWKINS. Lincoln's-Inn-Hall, 6th Dec.

(Reg. Lib. 1791. A. fol. 20. b.)

Practice. Plea must be set down within eight days. (1)

MR. SOLICITOR-GENERAL moved to discharge an order that had been obtained, by the defendant, to set down his plea; the eight days in which it ought to have been entered having expired, and the plaintiff having filed exceptions to the defendant's answer, and the order having been obtained without a special application: the entry of the plea was antedated.

Mr. *Abbot* stated the omission to have been occasioned by a slip.

But Lord CHANCELLOR seemed to think the rule ought to be complied

(1) The same rule prevails as to a demurrer.

with; and that if the defendant did not enter his plea within the eight days, he must be presumed to have abandoned it. (2) (a)

(2) The parties came, however, to an arrangement, and the Court thereupon permitted the order to remain. — R. L. The plea was argued soon afterwards, when it was allowed. *Vide postea*, 388.

(a) 1 Smith, Ch. Pr. (Am. edit.) 232, 233; 2 Madd. Ch. Pr. (4th Am. edit.) 295.

VICKERY v. [STOCKER.] (1) Lincoln's-Inn-Hall, same day.

(Reg. Lib. 1791. B. fol. 28.)

Practice. An order for payment of money [against a person not a party to the cause] (2) is to be enforced, not by attachment, but by another order directing the payment within a short definite (3) time; or, in default, that the party do stand committed. (3)

MR. LLOYD moved that the plaintiff's solicitor, who, upon taxation of costs, appeared to have received a considerable sum more than the amount of his costs, and who had been served with an order to pay the same, which he had not obeyed, should stand committed.

LORD CHANCELLOR [after consulting with the Registrar] (1) stated the practice to be, that if you want an attachment, you must go to the office; but if you want a more summary proceeding, you must move that the party pay in the money by a short day, or stand committed. And his Lordship made such an order in the present case. (4) (a)

(1) The name of this cause is *Vickery v. Stocker*. — R. L. and Mr. Cox's notes.

(2) See the distinction confirmed by Lord Eldon C., in *Bowes v. Lord Strathmore*, 12 Ves. 325, and *Anon.* 14 Ves. 207. A party to the cause is to be first served with a writ of execution, then an attachment, and upon that an order for actual commitment. *Vide ubi supra*, and *Collins v. Crumpe*, 3 Madd. Rep. 390.

(3) The word "forthwith" was formerly used; but it was indefinite for any practical use, and the practice has been corrected, by directing that some specific day should be named. *Vide per Lord Eldon C.*, in *Higgins v. Anon.* 8 Ves. 381, 382, &c.

(4) In this case the order was, that the party should pay the money within four days, or stand committed — R. L. and Mr. Cox's notes.

(a) See *Strange v. Harris*, ante, 365, and notes.

EAST INDIA COMPANY v. HENCHMAN. [Dec. 9.]

Lincoln's-Inn-Hall.

Practice. [A demurrer may be filed after the time for answering expired, if the party be not affected by process of contempt.] (1)

MR. STRATFORD moved, that a demurrer put in by the defendant might be taken off the file, the defendant having demurred after the time for answering was out, but before any *process of contempt [*373] had issued, the defendant's clerk in court having informed the plaintiff's clerk in court, that the defendant had obtained an order for time.

LORD CHANCELLOR was of opinion, that the defendant, till affected by

(1) *S. P. Sowerby v. Warder*, in the Exchequer, upon search of precedents, and great consideration, 2 Cox, 268, 269, *quod vide*. See also *Edmunds v. Savery*, 3 Meriv. 304, &c.

process of contempt, might put in a demurrer at any time; (a) and Mr. Mitford referred to the order for time, as showing that the defendant, after the eight days, is not considered as being in contempt, unless affected by an attachment; the words of the order being, that the defendant is not in contempt; and he also observed, that the condition, not to demur alone, proved it.

(a) 1 Barbour, Ch. Pr. B. 1, ch. 6, § 3, p. 109, 110; 1 Hoff. Ch. Pr. ch. 8, § 1, p. 213; Hamilton v. Hibbert, 2 Sim. & Stu. 225; Lane v. Ellisey, 4 Hen. & Munf. 504; Eden on Injunct. (2d edit.) 88, 89.

[For the general doctrine upon this subject, vide Mr. Swanston's note to Curzon v. Ld. De la Zouch, 1 Swa. 185. The demurrer, in the present case, was afterwards allowed by Lord Thurlow, Reg. Lib. A. 1791, fol. 42; 1 Ves. jun. 287. It was afterwards reheard, before Lord Rosslyn, in March, 1794, when he reversed Lord Thurlow's order, and that reversal was afterwards affirmed in Dom. Proc. 21st June, 1797; 8 Bro. P. C. Ed. Toml. 85. — Eden.]

CRAWLEY v. CLARKE. Lincoln's-Inn-Hall, 9th Dec.

Practice. The course against a M. P. for non-payment of money is, first to move for a sequestration *nisi* upon notice. (1)

MR. ABBOT moved [as a special motion] (1) for a sequestration *nisi* against Lord Sempill and his wife, for non-payment of money decreed to be paid, by them, to the defendant Clarke, producing, in support of his motion, the writ of execution under seal, a letter of attorney from Clarke, to demand the money, an affidavit of the due execution of the letter of attorney, and an affidavit of the demand having been made.

LORD CHANCELLOR thought, that it was an order of course, in the first instance, to which the Register agreed, but the next day Lord Chancellor mentioned it again, and said the motion was regular, as originally made, (1) and ordered a *sequestration nisi*. (2)

(1) From Sir J. Simeon's notes. Et vide supra, per Lord Chancellor.

(2) This report is from Lord Colchester's notes. { See 1 Smith, Ch. Pr. (Am edit.) 440. }

The ATTORNEY-GENERAL v. The Earl of WINCHELSEA, and Others.

Rolls, 30th Nov. [Vide S. C. 2 Cox, 304.]

(Reg. Lib. 1790. A. fol. 554. and 1791. A. fol. 487. Entered *Attorney-General v. Hurst*.)

Where a residue is left to charitable purposes, and it turns out to be more than adequate to the number of the objects, the whole must be applied to similar purposes. Mortgages cannot pass to a charity, though included in a general residue, such interest in lands being void by the stat. of mortmain. [Assets shall not be marshalled in favor of a charity, so as to throw the burden of debts from personal property upon chattels real; (1) but they shall contribute equally.] (1)

THE information stated (*inter alia*), that the Rev. Robert Chapman, late vicar of Ravenstone, deceased, by his will, dated 17th Sept. 1783,

(1) See the judgment upon these points, more fully, from the MS. notes of Mr. Le Mesurier, in Lord Colchester's collection, postea, p. 380, note (2). Vide etiam, Howse v. Chapman, 4 Ves. 542, 550, and Curtis v. Hutton, 14 Ves. 537, et seq.

gave and bequeathed the residue and remainder of his personal estate, in the words following: "I give and bequeath all the rest, residue, and remainder *of my goods, chattels, personal estate and effects, [*374] whatsoever and wheresoever, not hereinbefore otherwise disposed of, unto the Right Honorable the Earl of Winchelsea and Nottingham, Thomas Hanmer, Esq., G. Wright, Esq., and the Rev. Robert Dawbiggin, rector of Stoke Goldington, in the county of Bucks, and the vicar of Ravenstone for the time being, their executors, administrators, successors, and assigns, upon trust; that they, the said Earl of Winchelsea, Thomas Hanmer, G. Wright, Robert Dawbiggin, and the vicar of Ravenstone aforesaid, for the time being, or the survivors of them, do and shall, with all convenient speed, after my decease, put, place out, invest, and continue at interest, in their joint names, in the public funds, or parliamentary security, and not on any real security whatsoever, all and singular the residue of my said personal estate; and do and shall, from time to time, forever afterwards, pay, apply, and dispose of the yearly income, dividends, interest, and produce of the said residue of my personal estate, upon the trusts, and to and for the uses, intents, and purposes hereinafter mentioned (that is to say), that they, my said trustees, or the survivors of them, and their successors, do and shall, yearly and every year, forever afterwards, out of the said dividends, interest, and produce of the said residue of my personal estate, pay, or cause to be paid, by even and equal half-yearly payments (to wit), at the feasts of the Annunciation of the Blessed Virgin Mary, and St. Michael the Archangel, in every year, unto a proper schoolmaster, for the time being (to be nominated and appointed by my said trustees, or the major part of them, or their successors), the sum of 12*l.* clear of all taxes, charges, and deductions, the first payment of which to be made upon such of the said days, as shall first and next happen after the placing of the said residue of my said personal estate out at interest as aforesaid, for the teaching and instructing all and singular the children of Ravenstone aforesaid, for the time being, to read, write, cast accounts, and say their Catechism, at some proper convenient place in Ravenstone aforesaid, which I earnestly recommend to the said Earl of Winchelsea to appoint for that purpose, not doubting his inclination to do anything in his power to further my intentions in this matter: and also that they, my said trustees, or the survivors of them, or their successors, do and shall, yearly and every year, out of the said dividends, interest, profit, and proceeds of the said residue of *my said personal estate, lay out and expend the sum [*375] of twenty shillings, in the purchase of such books as they shall think proper for the use of the children of the said school; and also that they, my said trustees, or the survivors of them, or their successors, shall, yearly and every year, forever, apply the surplus of the said dividends, interest, profit, and proceeds of the said residue of my said personal estate (if any there shall be, after such payment as aforesaid), in the clothing and putting out apprentices to any trade, business, or occupation, that shall be thought proper for them, two children of the parish of Ravenstone aforesaid: and one child of the parish of Little Woolstone aforesaid: and he directed, that his said trustees, or the major part of them, should meet at least once a year at Ravenstone aforesaid, and inspect into the management of the said school, and settle and audit the accounts of the said charity; and appointed the defendants, H. Dering, and G. Pitt Hurst, executors of his will."

The testator died the 16th of October, 1785, possessed of a consider-

able personal estate, without leaving any wife or children, or any other next of kin; that the defendant, Mrs. Chapman, his only surviving sister, and defendant, Richard Daniel, his nephew, him surviving.

The information prayed, that the charitable bequests might be established; and that, after taking the usual account of testator's assets, the residue, or clear surplus of the personal estate and effects, might be ascertained and paid to the defendants, the trustees, to be by them invested and placed out at interest upon government securities, in their names; and that the dividends, or annual income thereof, might be from time to time forever, applied for the charitable purposes mentioned in the testator's will: and in case it should appear that such dividends, or annual income, should be more than sufficient to pay the annual allowance of 12*l.* to a schoolmaster, and the yearly sum of 20*s.*, for the purchase of books for the use of the said school, and the expenses of clothing and providing apprentice-fees for such three boys as aforesaid every year, then that the aforesaid charity might be extended and enlarged, in such manner as the Court might think proper; and that the whole of the interest or annual income of the whole residue and clear surplus [*376] of the said testator's personal *estate and effects, might be applied according to the directions of the testator's will, or as near thereto as the nature of the case and the circumstances would admit of.

The defendant, Richard Daniel, one of the next of kin, insisted, that the surplus of the testator's estate and effects was much more than sufficient to answer all the charitable purposes; and that a considerable part of the residue consisted of mortgages, or some other real securities; and that, so far as the gift or disposition of the said residue related to such securities, the same ought to be declared void; and submitted whether, as one of the next of kin, he was not entitled to a distributive share of such residue.

The defendant, Mrs. Chapman, the other next of kin, disclaimed having any interest in the residue, being desirous that the charitable bequests should be established.

The executors admitted, that the residue of the personal estate was of a considerable amount, and that a part thereof consisted of two mortgage securities, viz. 200*l.* which had been paid in since the testator's death, and 2000*l.* still outstanding.

The trustees submitted, that, as there was much more than sufficient to answer the precise number of objects specified in the will, the charity ought to be extended.

The cause came on to be heard the 29th of June, 1790, when it was referred to the Master to take the usual accounts, and to state what the testator's personal estate consisted of.

Subsequent to the decree, and previous to the Master's report, the defendant, Mrs. Chapman, assigned all her interest in the mortgages, and the residue of the testator's estate, to the trustees, for the benefit of the charity.

In consequence of such assignment, a supplemental information was filed, and the cause came on again the 30th of November, 1791.

Two questions were made; 1st. Whether the bequest of the residue, so far as it related to the real securities, was not void, as being within the statute of mortmain.

[*377] *2dly. Whether the surplus, beyond what was sufficient to answer the charitable purposes of the testator, should not go to the

next of kin; or whether the Court should not consider the whole as disposed of by the testator, from the next of kin, and be at liberty to extend the charity, by enlarging the number of objects.

Mr. *Schwyn*, and Mr. *Stanley*, in support of the information, contended, that however the bequest, so far as it related to the real securities comprised in the residue, might be void, yet, in order to support the intention of the testator, and to effectuate the charitable bequest as much as possible, the Court, as in former instances, ought to marshal or arrange the testator's assets: that there is a distinction between a specific bequest of a mortgage security, and a residue including such a security: that, in the latter, the Court has been favorably inclined in support of the charity, and has accordingly directed an equitable arrangement of the assets. *Attorney-General v. Graves*, Ambler, 155. As to the meaning of real security, they cited the *Attorney-General v. Bowles*, 2 Vesey, 547.

2dly. As to the surplus, it was insisted, that the whole residue was meant and intended to be disposed of by the testator in charitable purposes: that the number of the objects might be increased, under the directions of the Court, as in *Attorney-General v. Johnson*, Ambler, 190; *Attorney-General v. Sparks*, *ibid.* 201, the Court will give effect to the whole bequest. *Attorney-General v. Hoare*, cited in *Attorney-General v. Green* (ante, vol. ii. 495). If the property increases, the number of objects may be increased, and the whole applied. In *Thetford School*, 8 Co. 130, 2 Vern. 397, the charities were augmented in proportion to the improved value of the estate.

Mr. *Mitford*, and Mr. *Richards*, for the next of kin, insisted, that such part of the residue, as consisted of the mortgage security, could not take effect. *Attorney-General v. Martin*, which first came on the 6th of March, 1769, and was heard at the Rolls. "Mrs. Martin, by her will, gave all the residue of her moneys, government securities, household goods, and other personal estates whatsoever, after payment of her debts and legacies, to *her executors, upon trust, to dispose thereof [*378] for such charities as they or the survivors of them should think proper, and then gave, by her will and codicil, several legacies." An information was filed for an account of the personal estate, and the application of the residue to charitable purposes. The next of kin disputed the bequest of the residue, and it was insisted, that part of it consisted of real securities. The usual account was directed, and it was ordered by the decree, that the Master should particularly state whether any, and what part of the testator's personal estate was invested in any, and what securities. The cause came on again 26th March, 1776, when it was declared, that such part of the personal estate as arose from mortgages, or other real securities not specifically bequeathed, was applicable to the payment of debts and legacies, except those given to the charities; and that the residue, consisting of the other parts of the personal estate, should be applied to the charitable purposes according to the will, &c. This cause was appealed from to the present Chancellor, who reversed the decree, refusing to marshal the assets, and declared that the whole belonged to the next of kin, after deducting a certain proportion for costs. So in *Middleton v. Spicer*, 11th November, 1772, no difference whether a particular or general bequest of the personal estate, part of which consisted of money due upon mortgages and real security.

As to the surplus, they insisted that, as there was much more than sufficient to answer the charitable purposes, the residue, after the charities were provided for, must fall to the next of kin; although the Court has, in

former instances, as in the above-cited cases of the *Attorney-General v. Johnson*, *Attorney-General v. Sparks*, and the *Attorney-General v. Green*, augmented the charitable objects as the income of the estates has increased, yet it will not extend the charities further than the testator has intended to do, where the information is for a new establishment, as upon the present occasion. The true question here is, whether the testator meant to dispose of the whole of his personal estate, supposing the fund to be more than sufficient for the charitable purposes, or whether it shall not go to the next of kin. So in the *Attorney-General v. Bishop of Oxford* (ante, vol. i. p. 444, note), the next of kin insisted upon the surplus beyond what might be sufficient to build the church.

[*379] *As to the charity for putting out apprentices, suppose the fund had amounted to 100,000*l.* or any very considerable sum, the Court would not be at liberty to expend the whole of that fund in apprentice-fees: it must then go to the next of kin: it is tantamount to say, "I give so much out of the residue as will be sufficient for such charitable purposes." In such a case, the fund cannot be applied *cy pres*: if too large, the surplus, ultra the application of the testator's express bounty, must fall to the next of kin. As to the doctrine of *cy pres*, that can only take place where the whole fund is absolutely given away from the next of kin, and even then the Court does not readily adopt it; it was rejected in the *Attorney-General v. Bishop of Oxford*, for, in that case, the Court would not comply with the offer of the Bishop to repair; the intent must be complied with *in toto*, or nor at all. The testator there meant to build and not repair: a new church was the object of the testator's intention.

The Court should refer it to the Master, to state what the surplus is, before the point is decided as to the application of it.

Master of the Rolls. The question is, whether the whole surplus of this personal estate is not intended to go to the charitable purposes mentioned in the will, though more than sufficient to answer the exact number of objects there specified. The real intention of the testator is perfectly clear, that he meant to give the whole surplus. It has been said, that the distinction is, that where there is a definite object, and that cannot take place, the Court will not look for another object, but let the property go to the next of kin, or the heir-at-law; as, in the *Attorney-General v. Bishop of Oxford*, the only object the testator had in view was the building a church, or in fact, creating a pillar of vanity; that was his sole idea, and nothing short of that could answer his intention, and therefore the object must be effectuated *in toto*, or the property fall to the next of kin. So in the *Attorney-General v. Goulding* (2) (ante, v. ii. p. 428), where Mr. Justice Buller seems to have gone to a great extent, and as far as the case would well warrant him, (2) it was held, that the testator had no general intention beyond that specified in his will, and consequently that the bequest must be confined to the precise object, and not beyond it; but

wherever the intention has been to dispose of the whole property [*380] to certain purposes, as in the early case of Thetford *School, and numerous subsequent authorities, the whole has been applied: the intention has been considered as such, and it has been only inferred, that

(2) Although the M. R. (Sir P. Arden) seems thus to "doubt the doctrine in that case, he afterwards approved of that doctrine, and acted upon it, in the *Attorney-General v. Boulthée*, 2 Ves. jun. 390, and 3 Ves. 220." Per Sir W. Grant, M. R., in *Chapman v. Brown*, 6 Ves. 410. See also per Sir P. Arden in the *Attorney-General v. Whitechurch*, 3 Ves. 145, where his Honor explains the reasons, in which he concurs with the above-cited case.

the testator has been mistaken merely as to the *quantum*. It has been observed, as a strong mark of his intention, that, by giving the apprentices to three objects, he has marked out the limits of his bounty, and that the confining it to that number will be a sufficient compliance with his intention; but, according to the disposition of this residue, his intention could not be limited to three boys, and if it would pay more, the testator has shown an intent, that the surplus beyond that must be applied in the same manner; therefore I am of opinion it must be applied to the charitable purposes mentioned in the will: perhaps it may not turn out to be much more than sufficient, but if it should, the next of kin may then come to the Court, as in other cases, where there has been an increase of rents and profits. (a)

As to the point of the mortgage securities being comprised in the residue, whether they shall pass, or ratably bear the burden imposed upon the personal estate, there is a direct authority in point, of the *Attorney-General v. Caldwell* (Ambler, 635), where it is taken for granted they shall not pass, either as an absolute gift, or as included in a residue, but, that the Court will throw the whole burden upon that part of which the charity cannot avail itself. (3) In the *Attorney-General v. Meyrick*, 2 Vesey, 44, a direct gift of a mortgage was held void, and as to the residue, I cannot recognize the distinction which has been attempted to be laid down between a specific gift of a mortgage, and where it is comprised in the residue; in both instances it is an interest in land; and nothing, that in the least degree partakes of realty, can now pass under the stat. of mortmain. *Middleton v. Spicer* perfectly coincides with my opinion. A charity cannot take such an interest either directly or indirectly, but it must go in favor of the parties legally entitled to the benefit of it. (3) (b)

In the original cause. Declare, that the debts, legacies, and costs of the original suit ought to be paid out of testator's general personal estate, and out of the moneys secured upon mortgage, or other real securities, *pro rata*, except so far as such costs relate to any

(3) This report is very defective here. His Honor, after noticing the adduced case of *Attorney-General v. Caldwell*, said it was overruled by *Middleton v. Spicer*. Vide 2 Cox, 366, 366. The Editor is also in possession of a valuable note of this part of the judgment, taken by Mr. Le Mesurier, and for which he is obliged to Lord Colchester; it is as follows:—

"Dec. 3, 1791. His Honor this day gave judgment, and first considered the cases. That of *Attorney-General v. Caldwell*, reported in Ambler, 635, he said had been examined and appeared to be as reported. And it did look something like the Court's marshalling the assets in such a case. Then followed *Attorney-General v. Tyndall*, Amb. 614; and there were cases cited in Amb. 635, & 368. But he said the last case, of *Middleton v. Spicer*, 1 Bro. 201, had settled the point, and he went at large into it. He also mentioned *Frater v. Blagden*, which, as far as a dictum of Lord Chief Baron Smyth's went, showed, that the assets should not be marshalled. He conceived this case to stand upon the same ground as if the testator had specifically bequeathed his mortgages to one person, and the other part of his personal estate to another. In such a case they should contribute to the payment of the debts and legacies ratably according to the amount of what they took. The next of kin in this case he considered as if he had been a legatee of the mortgages, and therefore decreed, that the payment of the debts and legacies should be made out of the mortgages and out of the rest of the personal estate, ratably, according to the amount of each of them respectively."

(a) 2 Story, Eq. Jur. ch. 32, § 1178, § 1181; *Atty. Genl. v. Mayor of Bristol*, 2 Jac. & Walk. 321; *Atty. Genl. v. Dixie*, 2 My. & Keen, 342; *Atty. Genl. v. Draper's Co.* 2 Beavan, 508; *Atty. Genl. v. Coopers' Co.* 3 Beavan, 29; *Atty. Genl. v. Wilson*, 3 My. & Keen, 362, 372; *Hobson v. Blackburn*, 1 Keen, 273. Upon the doctrine of *cy pres*, see *Moggridge v. Thackwell*, post, 517; *White v. White*, 1 Bro. C. C. 15, note (a), and cases cited.

(b) See *Ram on Assets*, ch. 28, § 3, p. 346, et seq.; 2 Story, Eq. Jur. ch. 32, § 1180; *Atty. Genl. v. Tyndall*, 2 Eden, 207; *Ridges v. Morrison*, 1 Cox, 180; *Makeham v. Hooper*, 4 Bro. C. C. 153. As to building upon land already in mortmain, see notes to *Atty. Genl. v. Tyndall*, ubi supra, and *Atty. Genl. v. Nash*, post, 558.

proceedings to be had respecting the charities in question under the directions hereafter given for regulating the same: [which ought to be wholly paid out of the testator's general personal estate.] (4)

Declare, that the surplus of the personal estate, exclusive of such part thereof as shall appear to have been secured by mortgage (after (5) payment of part of the debts, &c. before mentioned) be applied for the several charitable purposes mentioned in the testator's will, and the surplus be retained by, or paid to the trustees, for the several charitable intents and purposes therein mentioned, and that a scheme be laid before the Master for the application of the charitable funds given by the will.

Declare, that one moiety of so much of the personal estate as shall have arisen from mortgages, or any other real securities (after payment of debts), doth belong to R. Daniel, one of the next of kin, and the same to be paid to him accordingly, and the other moiety to the other defendant Eliz. Chapman, as the representative of the other next of kin: and as to the supplemental bill, declare, that the deed of trust, of the 10th of (6) December, 1790, ought to be established and carried into execution, and all parties paid their costs, and that such part of the testator's estate as would have belonged, according to the declaration made in the original cause, to Eliz. Chapman, must be applied to charitable purposes mentioned in the testator's will, and that the same ought to be paid to, or claimed by the defendants, the trustees for such purposes, and all parties to apply to the Court as occasion may require.

(4) From Reg. Lib.

(5) After hearing the proportion of the testator's debts, &c. — R. L.

(6) September. — R. L.

LEE *v.* PRIEAUX. [PRIAULX.] (1) Rolls, 22d Nov.

(No Entry on this occasion.)

Legacy to a feme covert, "her receipt to be a sufficient discharge to the executors, is equivalent with saying, "to her sole and separate use." (2)

THE petition of Sophia Lee, the wife of Richard Lee, a bankrupt, prayed, that the sum of 296*l.* 9*s.* cash in the bank, standing in the name of the Accountant-General, being the interest and dividends of 122*l.* 6*s.* bank stock, which had accrued since the death of Jemima Wilson (formerly Price), might be paid to the petitioner, to and for her own separate use and benefit, independent of her husband, the plaintiff in the [*382] cause; and that the future interest and dividends to accrue due, *on the said 122*l.* 6*s.* bank stock, might be paid to the petitioner, for and during her life, and for her own separate use and benefit, pursuant to the will of Catherine Price, the younger.

(1) Lord Colchester's MSS. Although the name of the defendant is mistaken, the above seems a very full and good report; and it agrees, in substance, precisely with the MS.

(2) { *Tyler v. Lake*, 2 Russ. & My. 183; — *v. Lyne*, 1 Younge, 562; *Stanton v. Hall*, 2 Russ. & My. 180. } See also per M. R. upon this decision, 5 Ves. 521. Et vide *Ex parte Ray*, 1 Madd. Rep. 199, et seq., with the cases there cited. It should, however, be observed, that a husband, or his assignees, cannot be deprived of what otherwise would accrue by his marital right without an intention clearly manifested by the author of the gift, the settlor, &c.; *Lumb v. Milnes*, 5 Ves. 517, &c.

It stated (*inter alia*) the clause in the will of Catherine Price, the younger, deceased (upon which the question arose), dated 12th May, 1782, in the words following: "whereas I am, upon the death of Jemima Price, widow of my late uncle, R. Price, deceased, entitled to 1221*l.* 6*s.* bank stock, now standing in the name of the Accountant-General, in trust, in the cause of *Price* and others v. *Bedford* and others; now I do hereby give and bequeath unto E. Prieaux, her executors and administrators, all the said bank stock, and all my right, title, and interest to and in the same, in trust, that she, the said E. Prieaux, her executors, &c., do and shall regularly pay out of the yearly interest and dividends of such bank stock unto Ann Hill, widow, a clear annuity of 10*l.* by equal half-yearly payments, during the life of the said Ann Hill; and further, my will and intention is, that my said trustee, her executors, &c. do pay unto Sophia Lee all the overplus of the yearly interest and dividends of the said bank stock; and after the death of the said Ann Hill, my will is, that the said annuity of 10*l.* a year do cease, and that the whole yearly dividends of the said bank stock be then paid to the said Sophia Lee, during her life, and that my said trustee, her executors, &c. shall not be troubled to see the application of any sum or sums paid to the said Ann Hill and Sophia Lee, but their receipts in writing, respectively, shall be a sufficient discharge to my said trustee, her executors, &c. for the sum or sums so to be paid as aforesaid; and from and immediately after the death of Sophia Lee, I give the said 1221*l.* 6*s.* to such of the children of Sophia Lee as shall then be living, to be divided between them, share and share alike; and she appointed E. Prieaux sole executrix."

When the petition first came on, His Honor ordered it to stand over, that the assignees of Richard Lee, the bankrupt, might appear.

Master of the Rolls. When this petition first came on it was considered as a matter of course, and that, although the words "notwithstanding her coverture" were omitted, and no notice of the coverture, so as to bar the husband, yet that the other expression was sufficient to entitle the wife to this money.

*Having entertained some doubts about it, I ordered the petition [*383] to stand over for the assignees of the husband (he being a bankrupt) to make her claim.

Upon the part of the petitioner it was argued, (3) that it was competent to give a married woman the same absolute interest in personal property, as she might have had if a feme sole. The first case upon the subject is *Harvey v. Harvey*, 1 Wms. (127), and there Lord Chancellor Cowper entertained a doubt whether a married woman, though she might be competent, could take such a separate interest without the intervention of trustees; and whether the legal estate, devolving upon the husband, the Court could make him a trustee for the wife. But in *Bennet v. Davis*, 2 P. W. 316, that doubt was done away. Another case was cited by Mr. Selwyn, *Woodman v. Horsley*, MSS. 11th February, 1783; (4) there the

(3) Mr. Mitford and Mr. Simeon for the Petition. Mr. Graham, contra.

(4) Before Sir T. Sewell, M. R., Lord Colchester's MSS. See also the case of *Ex parte Ray*, 1 Madd. Rep. 199.

It is to be noticed, there is a material error in the case of *Johnes v. Lockhart*, reported as adduced by Sir Samuel Romilly in the above-mentioned case of *Ex parte Ray*, 1 Madd. Rep. 207; and there cited as from Mr. Abbot (now Lord Colchester's) note. It will be seen that the statement of the M. R., as in that note, was directly contrary to the proposition in support of which it was brought forward; and that the M. R. said, "that a legacy to a feme covert 'to her own use and benefit,' was not to her own separate use." As an abstract proposition it certainly seems rather questionable (see per Sir William Grant, M. R. *Coop. R. Ch.* 235, &c.). But it appears right as applicable to the case before him; there being a dis-

words were, "the wife's receipt shall be a sufficient discharge, notwithstanding her coverture;" and, though late in the day, a question was made as to the operation of those words: the bill was brought by the assignees, and dismissed, but without costs, as Lord Cowper had entertained some doubts upon the point in *Harvey v. Harvey*, and the bill had been filed upon the mistaken opinion of counsel.

The only question now is, whether the words in this will are sufficient to show that the testator meant to give an absolute power to the wife,

inction in the same will, there, between one sort of property left to the feme covert in those terms, and the gift of a residue wherein there was a prohibition against the husband's alienation without the wife's consent. The Editor has been careful to search the Registrar's book, and the following report of it is taken from that source, and from Lord Colchester's note of what the M. R. said on the occasion:

Esther Johnes, widow of Edward Johnes, deceased,

Plaintiff.

Stephen Lockhart and Joseph Allen, the younger (surviving Executors of the Testatrix, Ann Bowden), and Others

Defendants.

Rolls, 18th June, 1793.

(Reg. Lib. 1792, A. fol. 439, b.)

The bill stated (and the facts were admitted), that Ann Bowden, the testatrix, bequeathed to the plaintiff, Esther Johnes (then a feme covert), all her linen, furniture, plate, china, and other valuables for her own use and benefit, and then directed her executors to sell so much of her stock in the 3 per cent. annuities as would be sufficient to pay her debts, legacies, and funeral expenses, within 12 months after her decease: and after giving a small annuity to another person [and, as it seems, some legacies], "she bequeathed all the residue of her stock in the public funds, and all other her personal estate, unto the plaintiff and her late husband Edward Johnes, and directed that the said Edward Johnes should not sell the same without the consent and approbation of the plaintiff." That she appointed the plaintiff's late husband, and the above defendants S. L. and I. A. her executors, and died. Edward Johnes and S. L. above proved the will: and it appears from the bill and answers, that the plaintiff's late husband, after taking possession of the furniture, and other valuables ("which his co-executor did not think he himself ought to interfere with"), sold out a sufficient part of the money in the funds for payment of the testatrix's debts, legacies, and funeral expenses; and afterwards caused the whole residue thereof to be transferred into his own name alone; S. L., the acting co-executor, joining therein, as then supposing he was doing right, although he stated in his answer, he was then convinced, that mention should also have been made of the plaintiff's name, agreeably to the will. After this, Edward Johnes, by his will, disposed of the stock in question away from the plaintiff, and died; upon which his widow filed the present bill, praying that the stock (which was then remaining so invested) might be transferred into the name of S. L. as surviving executor of the testatrix, and that the dividends which had accrued since Edward Johnes's death might be paid to the plaintiff, &c. And after the appropriation of a sufficient part of the stock to answer the above small annuity, that the residue of the stock might be sold for the benefit of the plaintiff, or declared to be held in trust for her, and to be at her absolute disposal, and that the household furniture and plate belonging to the testatrix at her death, possessed by Edward Johnes, might be specifically delivered up to the plaintiff for her own use, according to the intent and meaning of the said testatrix's will, &c. &c.

The Court directed the usual accounts relative to the personal estate of the testatrix not specifically bequeathed, come to the hands of S. L., or Edward Johnes in his lifetime, or of his representatives, &c. &c. An inquiry was directed, "whether any, and what part, of the testatrix's personal estate, was transferred, or otherwise disposed of, by and with the consent of the plaintiff, during the life of her late husband." And another inquiry was directed as to what part of the household furniture and valuable articles, particularly mentioned in the will, remained in specie at the death of the plaintiff's late husband, and whether the same were used, and in what manner, during the lifetime of her said husband. The stock remaining in Edward Johnes's name was ordered to be transferred into the name of the Accountant-General.

Further directions and costs were reserved, &c. — R. L.

It appears from Lord Colchester's MSS., that His Honor, Sir P. Arden, said, at the hearing, that "a legacy to a feme covert 'to her own use and benefit,' without more, was not to be considered for the wife's separate use:" and His Honor said "he would not go beyond *Lee v. Priaux*, 3 Bro. 381. But, that a legacy to husband and wife, so as that the husband should not dispose of it without her consent, this was to her separate use." — Lord Colchester's MSS.

Upon this it is only requisite again to observe, that the first clause in His Honor's judgment must be confined to the first bequest in the testatrix's will of the furniture, plate, and other valuables; and that such construction seems induced by the absence of the prohibitory clause which existed in the latter gift of the residue. This latter clause made that part of the case similar in effect to *Ex parte Ray*, 1 Madd. Rep. 199, above cited.

independent of the husband, to receive the money; for it was argued, that it is incumbent upon the petitioner's counsel to satisfy the Court that such was the intent. There is no case in which words of this sort have been decided upon, one way or the other. As to *Darley v. Darley*, 3 Atk. 399, the decision was directly the reverse. The date of the decree is December 6, 1746. Reg. Lib. A. p. 263; the cause was heard upon the original and supplemental bills, the latter of which charges, that the plaintiff's father was a man of no substance, and incapable of maintaining himself, which made the plaintiff's grandfather averse to the match; but he afterwards consented, upon the plaintiff's father assuring him that he would not intermeddle with any part of the estate or effects he should, after the marriage, think fit to convey; but that the wife should have the sole power of disposing thereof by will, or any other mode of appointment; that the plaintiff's grandfather, being possessed of the term of one thousand *years in certain premises in the bill men-[*384] tioned, did, by indenture, dated 30th October, 1708, made between himself and plaintiff's mother, though a feme covert, in consideration of natural love and affection, and her livelihood and future support, assign a moiety of such term to the mother, her executors, &c. to hold from his decease. Upon the death of the grandfather, the plaintiff's father had acknowledged, that he had given the mother power to make a will; and particularly that the father had, by an instrument in writing, 22d April, 1711, promised to pay 200*l.* to such person as she should by will appoint; and, upon 1st August, 1715, he had also given her a power to devise 1000*l.* as she might think fit, and had subjected himself to pay the same. Upon the 26th June, 1738, the mother made her will, and gave, in pursuance of her power, to the plaintiff, the moiety of the aforesaid term, and the respective sums of 200*l.* and 1000*l.* That the plaintiff delivered the will to the defendant, J. Darley, to show to his father, which he did; and that the father, having considered the said provision as quite sufficient, left the plaintiff only 1*s.* In a bill filed against the father in his lifetime, the father had admitted, by his answer, that he had been informed that the mother had made such a will, but submitted, whether she had a power to do so without his consent; but it did appear that he had made some agreement that she should have a separate estate. The son, J. Darley, by his answer, afterwards insisted, that there never was any formal power delegated to her by the father, except by letter in the year 1715; and that if such letter was to be considered as giving her such a power with respect to the 200*l.* and 1000*l.*, that the same ought not to be executed, as the father, subsequent thereto, executed a bond in full discharge, by way of defeasance of any such instrument, and completely annulled the other power. By the decree, the original and supplemental bills, as far as the same related to the moiety of the term mentioned in the paper, 22 April, 1715, and the 1000*l.* in the letter of the 9th August, 1715, the 200*l.* in the instrument of 22 April, 1715, were dismissed.

Such a case, had it been correctly stated in Atkyns, might have deserved consideration, but, as it stands, is of no authority; and therefore, without resorting to cases, the point must solely depend upon the construction of the words used by this testatrix, and whether they are competent to give the petitioner a separate *interest in this money. [*385] Upon the most mature consideration, I am of opinion, that they are sufficient for that purpose. The law, undoubtedly, gives all to the husband, unless something is done to prevent it from so doing.

In this case, two women were the objects of the testatrix's bounty, the

one a widow, the other a married woman; and, with respect to the widow, she might have used these words as a caution against any future husband having a right to the money; and, as it has been contended, these words must have their meaning; and, without giving them such a one as has been insisted upon in favor of the petitioner, they would be mere surplusage.

The testatrix might probably insert these words, "her receipt should be a sufficient discharge," in consideration of the petitioner being a married woman; and the party was in that situation, that she could not otherwise have been authorized so to do; if these words have not that meaning, she might as well have omitted them. Therefore I am of opinion, that there is a clear intent to be collected from the words of this clause, that the testatrix meant that Mrs. Lee, though a married woman, should have the power to give a discharge, so as to bar her husband.

The assignees must have insisted, that the words could not have had the effect intended by them; and as to the argument, it is going out of the will, as the party was certainly capable of being made a feme sole: and though the testator has not, by the former words of the gift, put her into that situation, yet, by the latter clause, she has controlled the law, by words tantamount to saying, Whether under coverture or otherwise, her receipt shall be a sufficient discharge. (a)

No assignments could have been made; for how could the wife, with any propriety, have given her discharge to the assignees?

(a) No technical words are necessary to create a separate estate. Any words indicating that intention are sufficient. *Ballard v. Taylor*, 4 Desaus. 550; *Hamilton v. Bishop*, 8 Yerger, 33; 2 Story, Eq. Jur. ch. 37, § 1381; *Stanton v. Hall*, 2 Russ. & My. 175; *Newlands v. Paynter*, 10 Sim. 377; S. C. 4 My. & Craig, 408. Such intention, however, must be clearly indicated. 1 Madd. Ch. Pr. (4th Am. edit.) 471, 472; *Barrett v. Barrett*, 1 Desaus. 447, and other cases above cited. A legacy given to a married woman "for her own use, and at her own disposal," vests in her as separate estate. *Bichard v. Ames*, 1 Turn. & Russ. 222; *Stanton v. Hall*, 2 Russ. & My. 175.

So a bequest to a married woman and her infant daughter, to be equally divided between them, share and share alike, "for their own use and benefit, independent of any other person," will be construed to mean to their sole and separate use. *Margetts v. Barringer*, 7 Sim. 462; *Simons v. Horwood*, 1 Keen, 7. So a bequest to a married woman, "for her benefit, independent of the control of her husband," will receive the like construction. *Simons v. Horwood*, 1 Keen, 7. For other expressions, which have been held to give the wife a separate estate, see 2 Story, Eq. Jur. ch. 37, § 1382; *Clancy, Rights of Women* (Am. edit.), B. 3, c. 2, p. 262, et seq.

For expressions, which have been used in a bequest or instrument of conveyance or gift to a wife, which have been held not to give a separate estate, see 2 Story, Eq. Jur. ch. 37, § 1383. The wife's power over her separate estate may be qualified by the expressions used in the instrument of conveyance. See 2 Story, Eq. Jur. ch. 37, § 1382 a. See further on this subject, ib. § 1394, 1395, and notes; 1 Madd. Ch. Pr. (4th Am. edit.) 471, 472.

As to the doctrine of courts of equity, in reference to the manner in which a married woman shall take and hold her separate estate, and her power over it, see *Hulme v. Tenant*, 1 Bro. C. C. 16, and notes to that case; 2 Kent (5th edit.), 162, et seq., and notes; *Rich v. Cockel*, 9 Ves. 369; *Parker v. Brooke*, ib. 583.

*BOND v. The Duke of NEWCASTLE.

[*386]

Lincoln's-Inn-Hall, 6th Dec.

Where defendants are beyond the jurisdiction of the court, service of the subpoena on their clerk, in court, cannot be allowed to be deemed good service, though they have by that clerk in court filed a bill relative to the same subject. (1)

Mr. Cox moved, that, under the circumstances of this case, service of the subpoena in this cause, upon the clerk in court for the plaintiffs in the cause of St. George against the Duke of Newcastle, might be deemed good service, the defendants being still out of the jurisdiction of the court.

By an act of the 30 Geo. 3, c. 24, entitled, "An act for giving relief to such persons as have suffered in their rights and properties during the late unhappy dissensions in America," the commissioners for American claims were to make up books of the names of the persons whose claims were allowed, with the sums allowed set opposite to each name; and the lords of the treasury were to direct their warrants to the auditor of the receipt of the Exchequer, to make out standing orders in the names of the persons inserted in such books, for the sums to which they should be so entitled; to be signed by three lords of the treasury, and to be irrevocable; and which orders were to bear an interest of 3l. 10s. from July 5, 1788, and were to be chargeable upon certain supplies; and which orders were to be assignable by indorsement. And in order to prevent such orders from being fraudulently obtained from the auditor of the Exchequer, the commissioners were to make out certificates to the persons named in the books, containing the names and addition of the claimants, and the sum to which he or she should be entitled; which certificates should be carried to the proper officer, in the office of the auditor of the Exchequer, who, upon receiving it, should deliver out the order for the benefit of such person. The sale of such certificates had been very common, and it had become usual for the holders of them to assign them; and the assignments were, from time to time, registered in the auditor's office; and in consequence of the frequency of such assignments, printed copies of the assignments, with blanks to be filled up, were kept in the office, and were filled up by the clerks as occasion offered, upon payment of a fee of one guinea; and such certificates were sold at the Stock Exchange, at stated market prices, in the same manner as Exchequer bills. The plaintiff stated himself to be a broker, unconnected with defendant Hamilton St. George, and to have purchased, on the 19th July, 1790, at the [*387] Stock Exchange, from William Edwards, another broker, as the agent of William Linberry Grovenor, to whom the defendant, Hamilton Usher St. George, had assigned it, a certificate, made out in the name of the defendant, Hamilton Usher St. George, for the sum of 1122l. 10s., and paid the said Edwards such sum of 1122l. 10s. for the same; and that he purchased the same, without notice that the defendant, St. George, had

(1) See also *Anderson v. Lewis*, postea, 429, and in *Smith v. Hibern. Mine Comp.* 1 Scho. & Lefr. 238. Lord Redesdale C. overruled, on solid principles, three cases in Dickens, where the court had allowed service to be good on a party's general agent. The cases of *Lady Carrington v. Cantillon*, Bunb. 107, and *Gildenichi v. Charnock*, 6 Ves. 171, seem proper exceptions to the general rule. In the first, service upon a partner was held good against a partner absconding abroad; in the other, the party had appeared gratuitously on two motions. The case of service in an injunction-cause upon the attorney at law, is of a different nature. See *Delancy v. Wallis*, ante, 12; *French v. Roe*, 13 Ves. 593; *Kenworthy v. Accunor*, 3 Madd. Rep. 550, &c.

not full power to sell the same; or that he had executed any deed, whereby he had settled the same upon or to the use of his wife, the defendant, Marianne St. George; but hearing that the orders on such certificates were in the course of delivery in the auditor's office in the Exchequer, he, in consequence thereof, upon production of such certificates, applied there to have the orders for payment of the said sum delivered to him, as assignee of the defendant, Hamilton St. George, where he was informed that a bill had been filed by the defendant, Marianne St. George, and her trustees, in this Court, making a claim on the orders, which were therefore refused to be parted with till such bill was disposed of; and contended that, having purchased the certificates in market overt, and at a fair market price, he considered himself as a purchaser thereof for a valuable consideration, without notice of the claim of defendant, Marianne St. George, or her trustees.

Mr. Hamilton St. George having made this certificate the subject of a settlement after marriage, on his wife, Marianne St. George, by virtue of which she was to be entitled to half the money on the contingency of her surviving him, subject to one half of his debts, a bill had been filed in Trin. 1790, by Marianne St. George, and her trustees, against the Duke of Newcastle, praying that a receiver might be appointed to receive the orders therein mentioned, and also the money that would be payable thereon, and that the Duke of Newcastle might be restrained, by injunction, from delivering out the said orders for payment of the sums payable upon such orders, and that the defendant, Hamilton St. George, might be restrained from receiving the same, and injunctions had been obtained accordingly, which was the bill referred to, and the reason of the refusal to deliver the orders to the defendant.

[*388] *The defendant, Hamilton St. George, resides in the province of Virginia, and the defendant, Marianne St. George, and her trustees, in Scotland, out of the jurisdiction of this Court.

These facts were verified by affidavits, and the motion was, that the service of the subpoena on the clerk in court by whom they had filed their bill, might be good service upon them,

But Lord CHANCELLOR (2) thought, though this was a case of peculiar hardship, that it could not be allowed, and therefore

Refused the motion. (a)

(2) "The Lord Chancellor, after consulting the Register, said, it could not be done, even in a cross cause, or upon a supplemental bill, for they are distinct suits, in which the attorney or clerk in court have no authority to appear, and the Court will not bring the party into contempt for non-appearance, when, for want of privacy, he may know nothing of the order to appear." — From Lord Colchester's MSS. < See 1 Hoff. Ch. Pr. ch. 10, § 3, p. 355, and notes. >

(a) See 1 Smith, Ch. Pr. (Am. edit.) 116, 117; 2 Madd. Ch. Pr. (4th Am. edit.) 199, 200; 1 Barbour, Ch. Pr. B. 1, ch. 2, § 1, p. 50-52; 1 Hoff. Ch. Pr. ch. 3, § 3, p. 110, 111, and notes; ch. 10, § 3, p. 355; Anderson v. Lewis, post, 429, and notes. As to service in cases of injunction, see Burke v. Vickars, ante, 24.

JORDAN and Others v. SAWKINS.

[S. C. 1 Ves. jun. 402.] Lincoln's-Inn-Hall, 27th Dec.

(Reg. Lib. 1792. A. fol. 72. b.)

Plea of the stat. of frauds allowed, where a written agreement was essentially varied by parol. (1)

THE bill stated that Sawkins, the defendant, in the month of March last, and in consideration of 300*l.*, agreed to grant Mills, one of the plaintiffs, a lease of a public house, known by the sign of The Robin Hood, in High Holborn, for twenty-one years, to commence from the 21st of April, following, at a rent of 40*l.*, and that Mills paid 10*l.* in part-performance, a receipt for which, expressing the contract, was signed by the defendant: that Mills was concerned in the transaction, not on his own account, but as agent for the other plaintiffs, Jordan and Newnham, and it was shortly after agreed, between the plaintiffs and defendant, that the lease should commence on the 24th of June, in the present year, 1791, instead of the 21st of April, and that the same should be made to plaintiffs, Jordan and Newnham, instead of the plaintiff Mills.

A lease was accordingly prepared agreeable to this last agreement, and tendered to the defendant to execute, and the plaintiffs Jordan, and Newnham, offered to pay the remainder of the sum of 300*l.* when the defendant refused; upon which this bill was filed for a specific performance of the agreement.

To this bill the defendant pleaded the statute of frauds, to the discovery and relief, (2) as to so much as respected the latter agreement; and as to so much as related to the written agreement, he answered, that it was obtained from him at an under-value, and whilst he was in a state of intoxication.

*Mr. Lloyd, and Mr. Abbot, for the defendant (who set down the [*389] plea to be argued), contended that the plea was right both in form and substance: that if the second agreement stood alone, being merely a parol agreement, the plea would be a good bar to the relief; and it is equally so, though the second agreement, which is by parol only, refers to the former, which is in writing. The relation of the second to the former is the only circumstance that can cause any difficulty; but it must relate to the former, either as differing from it, or making part of it: and it is essentially different from it; for though the subject-matter of the agreement remains the same, yet the parties are changed by the substitution of Jordan and Newnham in the place of Mills, and the conditions are changed by varying the time of the commencement of the lease, both which are essential variations from the original written agreement. A parol variation of a written agreement cannot be enforced in equity, *Cokes v. Mascall*, 2 Vern. 34, where the subject-matter continued the same, and the parties also: but

(1) Vide Beames's El. Pleas, 172; Brodie v. St. Paul, 1 Ves. jun. 326, with Lord Redesdale C.'s addition to the statement of it; 1 Scho. & Lefroy, 35. See also Woollam v. Hearne, 7 Ves. 211. Et per Lord Eldon C. on the principal case in Robson v. Collins, 7 Ves. 133.

(2) After pleading the particular clause in the statute relative to agreements, the defendant averred, that neither the agreement in the bill pretended, or any other agreement to such or the like purport, nor any memorandum notes or note of the said pretended agreement [was or were] in writing, and signed by the defendant, or by any other person or persons, by him lawfully authorized. — R. L. It seems this plea was settled by Mr. Abbott, now Lord Colchester. Lord Thurlow observes, *postea*, 390, and note (3), *ibid.*, that the plea was right in form, and good in substance.

the defendant relying on the statute of frauds, the Court refused to decree a specific performance, the contract not being binding in equity. The suffering the plaintiff, in that case, to try his right at law, was no acknowledgment of his title to relief, as the construction of the statute of frauds is the same at law as in this Court; and if there is no relief either in law or equity, no discovery will be enforced; consequently a plea to both is good.

Then, if it is considered as a part of the former agreement, it is a part not expressed, and bad, so far. An addition by parol to a written agreement, cannot be helped in equity. The rule is so laid down in Comyns's Digest, tit. Chancery, (2 B. 4.) and *Foot v. Sawhay*, 2 Ch. Ca. 142. So in *Brodie v. St. Paul*, in this Court, 31st May last. Therefore the plea is good, both to the relief and the discovery sought by the bill as to the latter agreement.

Mr. Solicitor-General, and Mr. Stanley, for the plaintiff. The difference made by the parol from the written agreement, that the lease should be to different parties, is not essential; because Mills might have declared himself a trustee for Jordan and Newnham, if he so pleased. The whole agreement might have been waived by parol; why, therefore, should it not be varied? *Brodie v. St. Paul* is not like this case; there the [*390] agreement *was held void, because it was uncertain what covenants were read, and the unreasonableness of them was referred to the opinion of a third person, so that the whole was uncertain.

Cokes v. Mascall does not apply, for it appears by the report of the case, 2 Vern. 200, that the agreement there was afterwards decreed to be performed.

LORD CHANCELLOR. (3) As to the form of the plea, it is the common form, being a plea *pro tanto* to the parol agreement. The different period of commencing the lease makes a material variation, as it gives the estate from the owner for so many months longer. (a)

Plea allowed.

(3) Lord Colchester's note of the judgment, although in substance to the above effect, is rather more full; and is as follows:—"Lord Chancellor. As to the form, the plea is right; it is of common course; being a plea *pro tanto* to the excepted part specified; viz., the parol contract. And as to the substance; the different period of commencing the lease makes a material variation between the latter and the former agreement, since it gives the estate from the owner so many months longer."

Lord Eldon C. referring to this case, 7 Ves. 133, observes, in effect, that such variations would amount, in fact, to a new agreement; "that if a variation be legally agreed for, it is part of the contract; and if not legally agreed for, it is no part of the contract."

(a) As to the effect upon a written agreement of an alteration of it by parol; *Vicary v. Moore*, 2 Watts, 451, 456, 457; *Cummings v. Arnold*, 3 Metcalf, 486; *Chitty, Cont.* (5th Am. edit.) 108-113, and notes and cases cited; 1 Sugd. Vend. & Purch. (6th Am. edit.) 169, 170, [235, 237.]

The terms of a written agreement for the sale of goods may be varied by a subsequent parol contract, though the original contract falls within the operation of the statute of frauds. *Cummings v. Arnold*, 3 Metcalf, 486. As by a variation in the time of payment, *ib.*

As to the plea, see *Story, Eq. Pl. ch. 14, § 761*; *Parkhurst v. Van Cortlandt*, 2 John. Ch. 276. As to the power of courts of equity to vary and reform written agreements on parol proof of mistake, &c., and to enforce them, see *Pember v. Mathers*, 1 Bro. C. C. 52, and note (a) at the end of the case; *Rich v. Jackson*, 4 Bro. C. C. 518; *Jordan v. Sawkins*, 4 Bro. C. C. 477.

BENNET COLLEGE v. CAREY. Lincoln's-Inn-Hall, 10th Dec.

(Reg. Lib. 1791. A. fol. 63. b. Entered Corp. Christ. &c.)

Costs. [Determined on a rehearing to be sufficient, if a party can make a good title in a bill for specific performance at any time before the final decree.](1) [Where a Master's report is against the title, a vendor's bill may now be dismissed with costs upon motion.]

THIS was a bill for specific performance of a contract for the purchase of an estate; 800*l.* had been paid as a deposit. It appeared the defendant could not make a title. It was agreed, that the bill must be dismissed. Mr. *Lloyd* pressed Lord Chancellor to order the deposit to be returned; but his Lordship said, he could make no order upon a bill that was dismissed, for that would be decreeing relief.

His Lordship proposed dismissing the bill with costs, and Mr. *Solicitor-General* objecting to this, that the costs ought to follow the event of the suit, Lord Chancellor said, they were completely in the discretion of the Court. (2) [Such a bill can now be dismissed with costs, after a report against the title, by motion. *Walters v. Pyman*, 19 Ves. 351.]

But the College being desirous of having the purchase completed, if possible, it was referred to the Master, to inquire whether the defendant could make a title. (a)

(1) The report here is very confused and inaccurate. The matter came before the Court on a petition of rehearing; and it seems, that, in point of fact, the Court had originally been too hasty in taking upon itself to decide, that the defendant could not make a good title without giving him a reference to the Master as to the fact; the rule being, that it is sufficient if a good title can be made at any time before a final decree, after the Master's report. See Lord Sturton's case, cited 2 P. W. 630, and *Wynn v. Morgan*, 7 Ves. 202. In the principal case the petition of rehearing came on before Lord Thurlow, from a decree pronounced by his Lordship in the July preceding, wherein, after reciting, that "the defendants not being able to make a title to the estate comprised in the contract," the Court ordered the contract to be delivered up to the plaintiffs to be cancelled. And wherein also some collateral directions, as to the return of the deposit, &c., were entered as ordered by consent, &c. As to some of the defendants, no costs had been given. As to others, the plaintiffs were to pay their costs.

The petition of rehearing complained of the allegation that the petitioners were not able to make a good title to the estate in question, and as to its statement of their consent to the return of the deposit; whereas they submitted, that a good title could be made, and that the petitioners did not give such consent; and that therefore a reference ought to have been directed to a Master, as to whether a good title could be made, &c. &c.

The Court ordered the decree to be "varied by leaving out the following directions. Decree (the defendants not being able to make a title to the estates comprised in the contract), that the said contract be delivered up to be cancelled," and by inserting the following direction, "that it be referred to Mr. Wilmot, one, &c., to inquire whether the defendants can make a good title to the estate in question." The decree was also further varied by leaving out some of the directions as to payment of the money, "and those relative to the costs;" instead whereof was to be inserted, a reservation of the costs of the suit, and all further directions. — R. L.

(2) This point, in particular, has been considered as misreported by Mr. Cox and Mr. Cooke, who each took notes upon the principal case, which will be found particularly noticed in the 2d edition of Mr. Maddock's Prin. and Pract. of Equity. Vide thereupon, *Lewis v. Lozham*, 3 Meriv. 429, and *Springfield v. Ollett*, cited *ibid.* note to p. 430.

(a) See 2 Sugd. Vend. & Purch. (6th Am. edit.) 27, [41.]

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*HILL v. CHAPMAN.

[Vide S. C. 1 Ves. jun. 405.] Lincoln's-Inn-Hall, 12th Dec.

(Reg. Lib. 1790. A. fol. 152.)

[After certain legacies to the children of A. *nominatim*.] Testator gave the residue to the children of A. ["As aforesaid."] (1) By a codicil, he ordered 1000*l*. to be set apart as a security for annuities; a child born after the death of the testator, shall not take a share of the [residue, or of the] 1000*l*., it shall sink into the residue after the death of the surviving annuitants. (2) Where a supplemental bill brings a new interest before the Court, it is open to the parties to make any objection to the decree which might have been made at the first hearing.

THE testator, John Spackman, made his will, dated 15th January, 1785, and thereby (3) gave the residue to his trustees, the defendants, in "trust for the benefit of all his grandchildren, by his daughter Sarah, equally to be divided between them, and laid out for their respective benefit" ["as aforesaid."] (4) The testator made two codicils to his will, and by the latter, dated 19th November, 1785, he gave annuities to his servants to the amount of 30*l*. a year, and directed 1000*l*. 3 per cent. bank annuities to be set apart to pay these annuities.

The plaintiffs were the children of the testator's daughter, Sarah Hill, born before the death of the testator.

The defendants were the trustees, and a child born after the death of the testator (but during the life of the annuitants), who was brought before the Court, by a supplemental bill.

And the question was, whether the after-born child should take a share of this 1000*l*.

Mr. *Mitford*, and Mr. *Cooke*, for the after-born child.

Where a legacy is given to the children of A. it is, in general, intended children living at the death of the testator, unless there are words in the will, or circumstances to postpone the distribution; but when the fund is given to one for life, the words that would otherwise apply to the death of the testator, will apply to the death of the tenant for life, and will let in the children born before that event. *Ellison v. Airey*, 1 Vesey, 111; *Ex parte Crispin* (ante. vol. i. p. 386). So where any thing postpones the distribution, *Congreve v. Congreve* (ante. vol. i. p. 530), where the division was to be at the age of twenty-one, a child born before the eldest obtained twenty-one was let in. (1) Here the 1000*l*. given by the codicil is to secure annuities, and, of course, cannot be distributed till the annuities are dead, and therefore must be distributed among the children born before that period.

(1) See the report, 1 Ves. jun. 405. This, and the description of the individuals as to the legacies, seems very material. — Editor.

(2) The rule is, that all children shall take where the gift is general; but contra where testator clearly marks out a period of division. See *Hughes v. Hughes*, ante, 352, et post, 434; *Attorney-General v. Crispin*, and *Congreve v. Congreve*, ante, 1 vol. 386, 530. See also the MS. reports of the judgment in the next page, and *Leake v. Robinson*, 2 Merivale, 383; *Andrews v. Partington*, post, 401.

{ Where a testator bequeathed the residue of his personal estate to such of his grandchildren as should be living at his decease, in equal portions, it was held, that a grandchild, born within nine months after the testator's death, was entitled to a share of such residu*e*. *Hall v. Hancock*, 15 Pick. 255. }

(3) After having given distinct legacies to the children of his daughter, Sarah Hill, *nominatim*, directing the mode of investment, and the time when each legatee should have the possession; see the report in 1 Ves. jun. 405, and the MS. reports of the judgment, postea.

(4) *Hale v. Hale*, Prec. Ch. 50, and *Goodwyn v. Goodwyn*, 1 Ves. 226, were also cited. — MSS.

Mr. *Mansfield*, for the plaintiffs.

*The case of *Ellison v. Airey*, was determined on the special [*392] penning of the will; the *Attorney-General v. Crispin*, was upon the fund being given for life. The determinations have been, that the persons, in order to take, must bear the description at the death of the testator. In this case, the codicil only takes the 1000*l.* out of the residue, for the particular purpose of securing the annuities; there is no gift but of the residue, the determination as to which cannot be varied by the 1000*l.* being taken out for a particular purpose.

Lord CHANCELLOR. Where a supplemental bill brings a new person or a new interest before the Court, it is open to the parties to make any objection to the decree that might have been made at the first hearing. (a)

It is intelligible, that by "the children of A." the testator means children then born; if you go further, it must extend to all possible children. To tie it up to the death of the testator, is rather a forced construction. (5)

Where it is to one for life, and then to the children, it shows the intention to be children born then. If it was a specific legacy to one for life, and then to be divided, there could be no doubt.

If it were of a part to one for life, then to fall into the residue, and then the residue was ordered to be divided among children, the same principle would apply; which must extend to all the children: therefore, if the 1000*l.* was to be divided at the death of the surviving annuitants, it must be divided among all then born; but the difficulty here is, that the general estate must be divided at the death of the testator. The circumstance of taking out a part for the special purpose does not seem very material. If he says nothing upon the subject, upon the death of the surviving annuitant it must sink into the residue, which is divisible at the testator's death; and it is repugnant to say, one part of the residue shall be divisible at one time, and the other part at another.

I think it must fall into the residue.

I have always thought that the case of *Ellison v. Airey* went on a refinement, and was beside the intention of the testator. (6)(b)

(5) See the report of the judgment in 1 Ves. jun. 407. The Editor also subjoins extracts from two MS. notes of the judgment. — "Lord Chancellor. It is intelligible to say, when the testator gives to the children of A., he meant to give to the children in being at the time of making the will. (†) The doubt which I entertain here, is, whether it is possible, if a sum of money were given to A. for life, and then to be distributed as part of the residue, it should go differently from the residue given generally among the children, or whether it should not make the whole divisible among the children in being at the time of the death of the annuitant. If the 1000*l.* is not to be distributable until after the death of the annuitant, I do not see why it should not suspend the whole. I am of opinion, only those children living at the death of the testator must take. The Lord Chancellor also said, he was of opinion *Ellison v. Airey* went upon very refined notions."

From a note of Mr. Cooke, in Lord Colchester's collection.

The following is from Sir J. Simeon's MS. "Lord Thurlow said, he thought that the rule which had been laid down for vesting at the time of distribution generally contravened the intention; as it was generally the intention to provide for those living at the date of the will; (†) and if that was departed from, he should have thought it more consistent in all cases to take in all born at any time, as upon the construction of marriage settlements.

"But as the rule was laid down he would adhere to it, and that, the codicil having separated the 1000*l.* only for the sake of B.'s life interest, the 1000*l.* would pass to the objects designed under the will, which was the grandchildren living at the death."

(6) The Court on the Supplemental Bill declared, that the defendant was "not entitled to any part or share of the residue of the said testator's personal estate." — R. L.

(†) See however per Sir W. Grant, M. R., contra, 2 Merivale, 382, 383. Et vide *Congreve v. Congreve*, and *Gilmore v. Severn*, 1 vol. 330, 582, and the notes.

(a) 2 Madd. Ch. Pr. (4th Am. edit.) 524; 1 Barbour, Ch. Pr. B. 1, ch. 12, p. 362, et seq.; 2 ib. B. 4, ch. 2, § 1, p. 59, et seq.

(b) See *Andrews v. Partington*, post, 401, and notes; *Congreve v. Congreve*, 1 Bro. C. C. 330, and notes.

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*DOO v. BRABANT.

[Vide S. C. in K. B. 4. T. R. 706.] Lincoln's-Inn-Hall, 12th Dec.

(Reg. Lib. 1791. A. fol. 43.)

[Devise. Conditional limitation. Condition — precedent.] 1st. A devise to A. at twenty-one; and if she die under twenty-one to her children; or if she die under twenty-one, and no children, then over. A. survived twenty-one, and had children, and then died in the lifetime of the testatrix. Decided at law that A.'s children could not take; (1) the above being a condition precedent; contrary to the opinion of Lord Thurlow C.]

SARAH COUNSELL made her will, dated 7th August, 1777, and thereby gave 1000*l.* three per cent. consol. annuities, and other effects, to trustees, in trust for Sarah Counsell, of the age of twelve years, until she should attain her age of twenty-one years; then to transfer the said sum to the said Sarah Counsell, her executors and administrators, to and for her own use and benefit: and in case the said Sarah Counsell should die under the age of twenty-one years, leaving any child or children of her body lawfully begotten, then in trust for all and every such child or children who should live to attain his, her, or their age or ages of twenty-one years, and to be equally divided between them, share and share alike, if there should be more than one such child, and if there should be but one, then in trust for such child; but in case the said Sarah Counsell should die under the age of twenty-one, without leaving any child or children, or, being such, they should all die under twenty-one, then in trust for testatrix's three nieces, Mary, Ruth, and Sarah Ogle, equally to be divided among them.

In the year 1780, Sarah Counsell married Benjamin Doo, and died in April, 1790, in the lifetime of the testatrix, leaving the two plaintiffs, her only children, surviving her, and in the same month of April, Sarah Counsell, the testatrix, also departed this life. Mary and Sarah Ogle died also in the lifetime of the testatrix, and Ruth Ogle married the co-defendant, Brabant, and they claim in her right the trust-money mentioned in the bequest upon the contingencies, as having lapsed by the death of Sarah Doo in the lifetime of the testatrix.

The plaintiffs, the children of Sarah Doo, claimed also the bequest in the will, and prayed, by the bill, to have the same secured to their benefit.

The cause came on to be heard in Michaelmas term last, when

Mr. *Mansfield*, for the plaintiff, contended, that although the event of the mother's dying under twenty-one did not take place, yet the intent of the testator must prevail, and words must be supplied in the will [*394] to favor that intention. The children were equally objects of the testator's bounty with the mother. So in real estates, if the intention can be effectuated, the heir-at-law shall not prevail against the will. *Jones v. Westcomb*, Prec. Canc. 316; *Bradford v. Folry*, Doug. 63; *Statham v. Bell*, Cowper, 40.

Mr. *Solicitor-General*, for the defendants. It is clear that the testator only meant to give this money to the children in case the mother died under twenty-one, but not if she lived to attain that age; for had she survived the testatrix after that period, it is impossible to doubt but that the children could not have claimed to the prejudice of the husband. It would not

(1) See the argument and decision of this case at common law, in K. B. 4 T. Rep. 706. Et vide *Holmes v. Cradock*, 3 Ves. 317, 321; *Parsons v. Parsons*, 5 Ves. 578, 581, &c.; *Meadows v. Parry*, 1 Ves. & Beam. 124, and *Humberstone v. Stanton*, *ibid.* 384, 386, 387.

then have lapsed, but been vested: and, therefore, the question is, whether there is any case in which a certain absolute interest has been given upon the event of a party attaining twenty-one, and that the legatee attains twenty-one, and then dies in the lifetime of the testator, that the Court has said, because the legacy became absolute upon the contingency taking place, the person interested in the remainder, in case such interest shall not take effect, shall be entitled to it, in the event of the party dying in the lifetime of the testator.

The gift to the children was only in one event, upon the contingency of her dying under twenty-one, but she lived to that period; and had she survived the testatrix the children would have been defeated. Suppose the mother had had no estate limited to her, and this interest had been given over to the children upon her dying under twenty-one; as she attained twenty-one that devise would have lapsed, and the children could not have claimed. As to *Jones v. Westcomb*, the event of a child being born was uncertain and unknown to the testator. Here the event took place in the testatrix's lifetime.

Bradford v. Foley arose upon the second marriage of the son; and in that, and the former authority, the event never happened; in this it has, which circumstance makes a material distinction.

Mr. Ridley, on the same side. This is a lapsed legacy, and the plaintiffs now cannot claim under the description in the will. The Court cannot raise an intention for them in opposition to the words of the will, even supposing the intention to have been as Mr. Mansfield contends. It does not appear from the words *of this instrument; and the [*395] Court cannot make a will, in their favor. In † *Calthorpe v.*

† *Calthorpe v. Gough*, Rolls, 18th February, 1789. — (2) Sir Henry Calthorpe, by will (inter alia), gave 10,000*l.* to trustees, to place out in the funds, to pay the interest and produce during the joint lives of Sir Henry Gough and dame Barbara, his wife, into the proper hands of dame Barbara, or as she should direct, for her sole and separate use and disposal; and in case the said dame Barbara should die in the lifetime of Sir Henry, her husband, in trust to dispose of the said 10,000*l.* in such manner as the said dame Barbara, alone, without her said husband, notwithstanding her coverture, should, by any writing under her hand and seal, attested by two witnesses, direct or appoint; and for want of such appointment, to pay the same unto and amongst all the children of the said dame Barbara Gough, who should be then living, share and share alike; and if no such child or children should be then living, then that they should pay the same to such person as should be then in possession of the manor, &c., by virtue of the said will; but if the said dame Barbara should survive the said Sir Henry, her husband, then that the trustees, after the death of the said Sir Henry, should pay the said whole 10,000*l.* to the said dame Barbara for her own use.

By a codicil he confirmed the will, and added new trustees to see and cause to be paid, in equal payments, a legacy to his sister, and then directed, "in case my sister's children do not live to their several ages of twenty-one, the legacy left to her is to revert to my heir-at-law."

Lady Gough survived her husband Sir Henry, and died in the testator's lifetime, leaving plaintiff, Sir Henry Calthorpe, her eldest son, and heir-at-law; the defendants, Rev. Thomas Gough, and John Calthorpe Gough, and defendants, Eleanor and dame Charlotte, wife of Sir John Palmer, which dame Charlotte Palmer survived her mother, but died in the lifetime of the testator; and the defendant, Sir John Palmer, is her administrator. (2)

His Honor, in giving judgment, said, This is an absolute legacy to Lady Gough, qualified on account of her situation as a married woman. If she died in the life of her husband, she had a power of disposing of it; and if she did not so dispose of it, it was to go to her children. If she survived her husband, she was to have it absolutely. There was no event in which the children could take anything, which it was not in her power to deprive them of. The testator presumed, as every testator does, that the persons who were to take under his will would survive him. If the testator had foreseen the event which has happened, he would probably have provided for it; but that consideration ought not to influence my judgment, for the same observation will apply to all cases of lapsed legacies. As to the codicil, I cannot see that it makes any difference; Lady Gough would have taken the legacy just in the same manner under the codicil, as if it had remained upon the will alone.

He therefore determined, that the 10,000*l.* was payable to the person in possession of the manor. (3)

(2) See this case more particularly stated in the note to 4 T. Rep. 707.

(3) See next page (3), and the conclusion of the note 4 T. R., with 1 Ves. & Beames, 389.

Gough, (2) at the Rolls, there was a legacy of 10,000*l.* to Lady Gough, if she survived her husband, but if she died in the lifetime of her husband, leaving children, then to her children; she survived her husband, and died, having children, in the testator's lifetime; the decree was, that the children could not take. (3)

Mr. Mansfield, in reply. It would be absurd to suppose that [*396] the testatrix meant to die intestate as to this property; she *certainly meant to provide both for the mother and the children, and that if the first taker of it could not have the benefit, the second should; and all the authorities before cited have gone upon that principle.

Lord CHANCELLOR this day gave judgment.

After stating the case, his Lordship went on to the following effect: The question is, whether the legacy, with respect to Sarah Counsell, having become lapsed, the money shall go over to her children, or to the devisees over, the nieces of the testatrix; or it shall be considered as lapsed absolutely, and therefore go to the next of kin?

Till the last case, from the time of the last preceding decision, this question has been at rest: but the decision at the Rolls (4) has broke in upon the rule that has been established; that case has not been appealed from, and therefore has all the authority that acquiescence can give it; therefore, I shall not object to the present case going to the Court of King's Bench.

The old rule is, that where there is particular estate, created with a remainder over, and the first estate is void, the second estate shall prevail, as if it were an original estate. So where the first estate is for life, to a person incapable of taking, with a remainder over, the remainder-man will take immediately. I suppose the authority referred to by *Mr. Justice Powell*, where he puts the case of a monk, and says, that where an estate is given to a monk for life, with remainders over, that the remainders shall not take place till after the death of the monk, and if he die in the lifetime of the testator, the remainders shall not take place, is 19 Hen. 6. I looked into the book, because I suspected there was no such case, as I thought it unreasonable. I take the law to be quite otherwise, and that the remainders should take place immediately. The same is the case where there is land limited to two jointly, and the one dies in the lifetime of the testator, and the estate will survive to the other. There are no cases of executory devises of this sort: but whether it be by way of executory devise, or contingent remainder, the law seems to be, that where the event has actually happened, the case will fall under the same reasoning, as if it were given as a remainder. Suppose it were a [*397] negative condition for life to A. *if A. lives to twenty-one, if not then over. If A. died under twenty-one (though I do not remember the particular case to have been decided), the general principle must prevail. So if A. gives an estate to B. on condition, and if he does not perform it, then over, the determination must be the same. There have been different determinations as to this point; and I wonder at it, because it was originally decided as it was afterwards. There is a case in *Fortescue*, 104, that the estate having lapsed, the condition lapsed, and the remainder could not take place. In that case, an estate was given to A. upon condition of paying 100*l.* to B., and the estate lapsed: but, upon the

(2) See note (2) in the preceding page.

(3) See what Lord Alvanley says in support of his decision in this case (notwithstanding Lord Thurlow's observations, post, 398, 398), 3 Ves. 321, and 5 Ves. 581.

(4) *Calthorpe v. Gough* (cited *supra*). See however the references in preceding note.

same reasoning that was used in that case, Lord Hardwicke, in *Avelyn v. Ward*, 1 Vesey, 420, decided that the limitation was good, and that wherever there is a conditional limitation, and the first estate becomes void, the second estate shall take place. This doctrine has since prevailed, *Hayward v. Stillingfleet*, 1 Atk. 422. The rule is, that where there is a conditional limitation, it shall not be considered as a precedent condition, but as a description of the estate. This point first received its determination, in the cases on Waith's will: there the testator died, leaving a wife and three sisters. He devised to his wife for life, remainder to the child she was then supposed to be *enceinte* of, and in case if such child should die before twenty-one, without issue, the reversion to his wife and two sisters, Elizabeth and Anne. The question first came on in *Jones v. Westcombe*, Pre. Ch. 316; afterwards in *Andrius v. Fulham*, 2 Strange, 1092; *Roe v. Wicket*, *Gulliver v. Wicket*, 1 Wils. 105; and in *Avelyn v. Ward*, 1 Vesey, 420. Lord Hardwicke, in *Fonnereau v. Fonnereau* [3 Atk. 316, 318], denied the case of *Glasscock v. Warren*, Comb. 437 [there called *Eastcourt v. Warry* (see also 1 Ves. 421)], because it was not to be found upon the roll; but I do not think that a sufficient ground. *Page v. Haywood*, 2 Salk. 170, is only a gift in special-tail. Davis, lessee of *Pearce v. Norton*, 2 Williams, 390, when I considered this case, I was surprised at the note; it is against all the principles, and in the teeth of former decisions; all the remainders were vested, and should have taken place: the case is no authority for any one point; it is mis-conceived from beginning to end. From the whole of the determinations on the case of Waith's will, I must take it as a rule, that wherever the prior estate is made to depend upon any described event, and the second estate is to arise upon the determination of that event, the first is not to be taken as a condition *precedent, but, upon its failure, [*398] the second estate must take place.

The case of *Scattergood v. Edge*, 1 Salk. 229, is so ill reported, that it is not easy to discover what points were determined.

In *Fonnereau v. Fonnereau*, 3 Atk. 645, Lord Hardwicke resorted to the general rule.

Statham v. Bell, Cowper, 40, was held to be a contingency with a double aspect; on the one event void, on the other good, as if it had never been contingent.

Bradford v. Foley, was only a common contingent remainder; its only view was to defeat the remainder, if Thomas married any of the kindred of Muriel Aynscombe.

The case I alluded to, as contradicting the rest, is *Calthorpe v. Gough*. (5) That was a contingency, with a double aspect; if Lady Gough survived

(5) Lord Alvanley, M. R., said upon this, in *Holmes v. Cradock*, 3 Ves. 321, "I know Lord Thurlow gave a strong opinion against my determination of *Calthorpe v. Gough*; and rather intimated that, upon the clear intention, he could supply the words that were wanting in the will before him. It went to law; and the court of law made the same answer that I am afraid I must here. So strong a case as that can hardly be stated;" and again, in *Parsons v. Parsons*, 5 Ves. 581; "Lord Thurlow seemed to entertain considerable doubts upon my decision in *Calthorpe v. Gough*; but I rather think that case was not sufficiently stated to him; for it was not near so strong as *Doo v. Brabant*, which Lord Thurlow sent, after intimating a strong opinion upon it, to the Court of K. B. But that Court dissenting from that opinion, His Lordship decided according to *Calthorpe v. Gough*. That case admitted of none of the inferences which might have been made in the other. It was clear nothing was intended to vest in the children, but what Lady Gough had a complete power to dispose of; and I have been since informed, that, knowing the will of her brother, who became a lunatic, she actually exercised that power: and though it lapsed, that is an event nine times in ten unforeseen by the testator; who probably, had he foreseen it, would have provided accordingly."

her husband, she was to take; if she died in his lifetime, the children were to take. The Court held that there was a condition precedent. This seems to be directly against the rule that has been laid down, and, if it is to stand, will subvert it.

These are the cases which go to the principal point.

But here is another singularity. Suppose that, in *Calthorpe v. Gough*, it was right that it should go to the children, whether it will apply to this case? It will, if the children were the objects of the testator's bounty; but it was not meant for the children born after Sarah attained twenty-one. The question is, whether these are the persons intended to take in the second instance, for they must be the same persons who were intended to take.

In *White v. Barber*, 5 Bur. 2703, and Amb. 701, the after-born children were held to be within the description of posthumous children; that case seems to have gone further to come at the intent of the testator than is necessary in the present. It was contended there, that if the description was grammatical, it must be followed, and that the word *posthumous* could not, in its grammatical sense, be applied to the after-born children; that there was nothing in the will to vary the natural sense of the

[*399] *word *posthumous*, and that if he had had children *really posthumous*, they must have taken; but the Court only certified that they could not conceive the testator meant to exclude his own children in favor of nephews.

If the testatrix here did not mean to exclude the children of Anne, the nieces cannot take.

It being admitted, that the children were born before Anne attained twenty-one, the Chancellor inclined to decide in their favor, but gave liberty to the other side to have a short case (stated as upon leasehold property), for the opinion of the Court of King's Bench. (a)

The case was accordingly sent to that Court, and the question was put, "Whether the plaintiffs took any, and what estate in the said leasehold premises, by virtue of, and under the will of, the said Sarah Counsell?" It was argued, and the Court certified as follows:

We have heard counsel, and considered the case, and are of opinion, that the plaintiffs took no estate whatsoever in the said leasehold premises, by virtue of and under the will of the said Sarah Counsell; the events, upon which the limitation under which they claim was to take place, not having happened. (6) (b)

Kenyon.

William Henry Ashhurst.

Francis Buller.

N. Grose. (6)

9th June, 1792.

(6) The Lords Commissioners, Ashhurst and Wilson, upon the 13th July following, confirmed this certificate, and dismissed the bill; but without costs.

(a) This precaution had not been complied with, but the Court permitted the form of the case to be altered, after argument. As to a court of law not taking judicial notice of a lien of a trust, or of money, vide *Sabbarton v. Sabbarton*, For. 246; *Porter v. Bradley*, 3 T. R. 146; *Parsons v. Parsons*, 5 Ves. 581. That the Court of King's Bench will, contrary to the old practice, answer a case sent by the Master of the Rolls, vide *Daintry v. Daintry*, 6 T. R. 313; *Horton v. Whitaker*, ante, vol. ii. 88. — *Eden*.

(b) See 2 *Williams*, Ex. Pt. 3, B. 3, ch. 2, § 5, p. 764, 765; *Gill v. Weaver*, 1 Dev. & Bat. Eq. 41.

[Mr. Fearn divides the cases upon this head into three classes; first, those in which the limitations in question have been after a preceding estate, which is made to depend on a contingency which never takes effect. Secondly, where the limitations over have been upon a conditional determination of a preceding estate, where such preceding estate never took effect.

Thirdly, where they have been upon the determination of a preceding estate by a contingency which, though such precedent estate takes effect, never happens. Extremely minute subdivisions often tend more to perplex than to elucidate; these distinctions have been disregarded in all subsequent discussions of this question, and therefore serve more to display the analytical correctness of that profoundly learned and ingenious writer, than to assist in presenting a clear view of the various determinations. The true question in these cases, and indeed the one which Mr. Fearne has subsequently referred to, is, whether the condition be annexed to the preceding estate, or is a condition precedent upon which the subsequent limitations depend. No precise words, as it has been repeatedly decided, are necessary to constitute a condition precedent in wills. The intention, as collected from the whole will, must control particular expressions; and therefore words of apparent condition have, in these, as in other cases, been explained and controlled by the context. In the following cases the condition has been considered as affixed only to the previous estate, and not as a condition upon which the subsequent limitation was to depend. A construction to which the Courts have inclined; for, as observed by Lord Alvanley (3 Ves. 320), these conditions shall never be extended beyond what is absolutely necessary from the context of the will, and shall not be supposed to govern any disposition, except that upon which they may be naturally supposed to attach. *Napper v. Saunders*, Hutt. 119; *Luxford v. Cheek*, 3 Leo. 125; *Scattergood v. Edge*, 1 Salk. 239; *Jones v. Westcomb*, 1 Eq. Ab. 245; *Tracey v. Letheuillier*, Amb. 204, 2 Atk. 774; *Avelyn v. Ward*, 1 Ves. 420; *Bradford v. Foley*, Dougl. 53; *Statham v. Bell*, Cowp. 40; *Horton v. Whitaker*, 1 T. R. 346; *Pearsall v. Simpson*, 15 Ves. 29; *Meadows v. Parry*, 1 Ves. & Bea. 125; *Murray v. Jones*, ib. 313.

In the following cases, on the other hand, it has been considered as a condition precedent, which must happen in order to give effect to the subsequent limitation. *Holcroft's case*, Moor. 436; *Estcott v. Warry*, Comb. 437; *S. C. nom. Grasscott v. Warren*, 12 Mod. 128; 2 Eq. Ab. 361 (which seems directly overruled by *Statham v. Bell*, sup.); *Davis v. Norton*, 2 P. W. 390; *Sheffield v. Lord Orrery*, 3 Atk. 282; *Russell v. Russell*, 5 Burr. 2806; *Doe v. Shipphard*, Dougl. 76; *Doe v. Wilkinson*, 2 T. R. 209; *Calthorpe v. Gough*, sup.; *Doe v. Brabant*, sup.; *Denn v. Bagshaw*, 6 T. R. 512; *Holmes v. Cradock*, 3 Ves. 317; *Humberstone v. Stanton*, 1 Ves. & Bea. 385. — *Eden.*]

HARRIS v. JAMES. Lincoln's-Inn-Hall, 13th Dec.

An answer prepared for five, cannot be sworn to, as the answer of three of them only. (1)

FIVE defendants appeared to a bill, and a joint answer was drawn for them all; only three appeared at the office to swear it, which was refused by the officer.

Mr. *Richards* now moved, that the answer might be filed, as the answer to the three who appeared to swear to it; and stated as the practice, that, where an answer is proposed as the answer of *three, [*400] and two only appear to swear it, it is taken as the answer of those two. (2)

LORD CHANCELLOR said the practice, if it prevailed, was wrong; that the officer's was a good objection; and that, if he granted the motion, he should direct the officer to do an improper thing, and that the answer ought to be amended. (3)

Mr. *Richards* saying this could not be, as it was not filed,

LORD CHANCELLOR refused the motion. (a)

(1) Such an answer ordered to be taken off the file with costs. *Cooke v. Westall*, 1 Madd. Rep. 265, S. P. Also, where an answer purported to be that of five, where there were six that had sworn it. *Cope v. Parry*, ibid. 83. The decision, therefore, in *Doe v. Read*, 2 Ves. & Beames, 310, is wrong.

(2) "And that it was explained by the docket thus stating the fact." From Lord Colchester's MSS.

(3) His Lordship there said, that, "although no order to amend the answer could be made before it was filed, yet the parties desirous of using it must alter it, by striking out the other two names, and reswear it." From Lord Colchester's notes.

(a) See 2 Madd. Ch. Pr. (4th Am. ed.) 331, 332; 1 Smith, Ch. Pr. (Am. ed.) 268, 269.

REDDING v. WILKES. Lincoln's-Inn-Hall, 14th Dec.

(Reg. Lib. 1791. B. fol. 121.)

Putting a deed into the hands of a solicitor, to prepare a conveyance of the estate to a son-in-law (after marriage), not a part-performance of a parol agreement, so as to take it out of statute of frauds; a demurrer allowed on that ground to a bill for specific performance. (1)

PLAINTIFF stated by his bill an intermarriage between himself and the daughter of defendant; and that the defendant, previous thereto, promised to pay to the plaintiff the sum of 500*l.* as a marriage portion; that the defendant had, at different times, paid him 300*l.*, which plaintiff had laid out in purchases, which he had settled on the marriage; but that defendant had never paid, and refused to pay the other 200*l.*, pretending that he only promised 500*l.* stock, and that the 300*l.* he had paid amounted in value thereto; whereas plaintiff charged the promise was of 500*l.* sterling.

Plaintiff further stated, that, after marriage, the defendant promised the plaintiff, that, in order to increase his income, he would convey certain messuages to plaintiff and his wife, and directed him to prepare conveyances of the same, which, being produced to him, he refused to execute.

The bill further stated, that the defendant pretended he could not pay any further sum without injuring his family, as he intended to convey the premises; and, with respect to the conveyance, stated, that he had in his possession the original lease of the premises; and that a conveyance of the same having been drawn according to defendant's directions, he had directed certain alterations to be made therein, which having been done, he refused to execute the same. The bill contained several interrogatories, &c. to defendant's substance, and the state of his family, and ability to pay the 500*l.* without injuring them.

[*401] *To this bill the defendant demurred; and, first, as to the discovery, whether he did not pretend that he could not pay the 500*l.* without injury to his family; and of the state of that, and of his substance, he showed as cause of demurrer, that the plaintiff had not, by his bill, stated such a case as ought to entitle him to a discovery thereof; and as to the discovery whether the defendant, after the marriage, promised the plaintiff to convey the premises in bill named, and the instructions to prepare the conveyances, he, for cause of demurrer, showed, that plaintiff, by his own showing, was not entitled to such discovery; and answered, with respect to the promise of the 500*l.*, that he had promised 500*l.* stock, the value whereof he had paid to plaintiff.

Mr. [Josiah] Brown, for the plaintiff, — with respect to the former part, said, that being to interrogatories immaterial to the question, the demurrer might prevail; but as to the latter, it should have been a plea of the statute of frauds, not a demurrer. That the allegation of the bill was, that a conveyance had been prepared, and alterations made by the defendant's desire, which was a part-performance.

Lord CHANCELLOR said, that putting the deed into the solicitor's hands, to prepare the conveyance, was not sufficient to take it out of the statute

(1) Vide *S. P. Bawdes v. Amburst*, Prec. Ch. 402, and 1 Eq. Ca. Ab. 21; Clerk v. Wright, 1 Atk. 12.

of frauds; (2) (a) that the statute is different, in the case of marriage, from other circumstances; and that marriage had been held not to be a part-performance, and

Allowed the demurrer.

(2) This was the sole ground upon which the demurrer was in fact allowed: although the bill was objectionable on the one here noticed, it stating a mere *nudum pactum*. From Lord Colchester's MSS.

(a) See 2 Story, Eq. Jur. ch. 18, § 762, § 768, and cases cited; *Whitchurch v. Bevis*, 2 Bro. C. C. 559, 566, and notes and cases cited; 1 Sugden, Vend. & Purch. (6th Am. ed.) ch. 3, § 7, p. 140, [199.] et seq.; *Whitbread v. Brockhurst*, 1 Bro. C. C. 404, and notes and cases cited. Payment of the purchase-money is not such part-performance as takes the case out of the statute. *Keats v. Rector*, 1 Ark. 392.

ANDREWS v. PARTINGTON. Lincoln's-Inn-Hall, 16th Dec.

(No Entry.)

Bequest of a residue to all the children of A., the daughters' shares to be paid at twenty-one, or marriage, the sons' at twenty-one, or to be sooner advanced for their benefit, with survivorship and interest for maintenance. The fund shall be divisible when the eldest attains twenty-one, and the division shall be among those then in *æsc*. (1)

ROBERT ANDREWS, grandfather of the plaintiff, made his will, bearing date 19th August, 1763, and thereby gave to the defendants, Partington and Andrews (the father of the plaintiffs), all his real and personal estates (subject to debts): in the first place, to pay taxes, repairs, and for the renewal of leases; and out of the rents, &c., to pay his wife, Margaret, 800*l.* a year, until his daughters, Diana and Catherine, should marry; and, after *their marriages, 600*l.* a year for life; and sub-[*402] ject and without prejudice thereto, out of the rents and profits, to raise 3000*l.*, as soon as might conveniently be, after his decease, to be paid in manner following: (i. e.) 2000*l.* to his daughter Diana, and 1000*l.* to his daughter Catherine, accumulating the surplus rents and profits during the life of his wife; and, after the decease of his wife, the further sum of 7000*l.* to be paid to his daughters, at such times, and in such proportions, as therein mentioned; (i. e.) 3000*l.* to Diana, on the day of her marriage, and 4000*l.* to Catherine, on the day of her marriage, provided such marriages should happen after the decease of his wife; and

(1) Mr. Roper, in his *Treatise on Legacies*, 1 vol. 71, et seq., referring to this and other cases, such as *Congreve v. Congreve*, ante, 1 vol. 536, &c., *Hughes v. Hughes*, ante, 352, postea, 354, &c., states the law thus:—

"It appears to be now settled, that when legacies are given to a descript class of individuals, payable at a future period; as 'to the children of B., when the youngest shall attain twenty-one,' or, to be divided among them on the death of C., any child who can entitle himself under the description at the time of distributing the fund, may claim a part of it; viz. as well those children living at the period of distribution, though not born till after the testator's death, as those born before, and living at the happening of that event."

Sir Wm. Grant, M. R., in *Leake v. Robinson*, 2 Meriv. 382, 383, referring expressly to the principal case, observes:—

"A bequest 'to a parent for life, with remainder to his children,' includes all children; both those born before and those born after the testator's death. The rule is completely settled; and, indeed, I believe, whenever a testator gives in that manner, he does mean to include all the children such parent may at any time have. That is not an artificial rule; it is the rule which excludes any of the children which is so; and it has been called an artificial rule; namely, the rule in *Andrews v. Partington*, and other cases, which excludes all who may be born after the eldest attains twenty-one."—See in particular the Editor's note to *Congreve v. Congreve*, ante, 1 vol. 530; *Gilbert v. Boorman*, 11 Ves. 238, and *Deffins v. Goldschmidt*, 1 Meriv. 417, 420.

in case either of his daughters should marry in the lifetime of the wife, then her share to be paid her within six months after the death of the wife; the shares of the daughters, after decease of the wife, to bear interest at 4 per cent.; and in case his said daughters, or either of them, should die unmarried, then, upon trust, to pay the share or shares of her or them so dying in the manner following: (i. e.) 2000*l.* part of the 3000*l.* share of Diana, to all and every the child and children of his son Robert Andrews, equally to be divided between and among them; if more than one, share and share alike; and if but one, then to such only child; the parts or shares of such child or children to be paid in manner following: (i. e.) the daughter's shares at her or their age or ages of twenty-one, or day or days of marriage, which should first happen; and the son's share or shares, at his or their age or ages of twenty-one; or to be sooner advanced, for his or their preferment in the world, or benefit, if the trustees, or the survivors of them, &c. should think fit, with survivorship among the children, the dividends and interest thereof to be paid by the trustees, toward the maintenance and education of such child and children, till their shares become payable, in proportion to their respective shares and interests therein; and in case all the children should die before their shares became payable, then the 2000*l.* to be paid to his son Robert Andrews. The testator also declared the uses as to the remaining 1000*l.* given to his said daughter Diana, for the benefit of the children of his daughter Margaret Ashcroft; and with respect to 2000*l.* of the 4000*l.*, his daughter Catherine's share, he also gave it in the same manner with the first 2000*l.* given to his daughter Diana; and the other 2000*l.*, part thereof, he gave among the children of his daughter Margaret Ashcroft, in the manner therein mentioned; *and he gave the residue of his estate, after the death of his wife, after payment of 1000*l.*, to his son Robert Andrews; and three annuities, to persons since dead, to the children of defendant, Robert Andrews, in the same manner with the 2000*l.* given in the first place to Diana.

The testator died 27th August, 1753, and his wife, and defendant Partington, proved his will.

The widow died 23d May, 1774, leaving defendant Partington the surviving executor.

Catherine Andrews, one of the testator's daughters, intermarried with John Neale Pleydell Nott, Esq., and 4000*l.* part of the 7000*l.* were, after decease of the mother, paid to the trustees named in the settlement upon the marriage, together with 1100*l.* arising from savings, and from another fund.

The remaining 3000*l.* was never raised; Diana, the other daughter, never having married; but interest for the same has been paid to her from the death of the widow.

Sarah Andrews, wife of the defendant, Robert Andrews, son to the testator, died in April, 1781, and the plaintiffs are the children of that marriage, six of whom had attained their ages of twenty-one, previous to the filing of the bill, and the six others were minors.

The bill prayed (among other things) that the freehold and leasehold estates might be sold, and six twelfth parts of the produce, and also of the residue, and accumulation, might be paid to the six plaintiffs, who had attained twenty one, and the remaining six twelfth parts be placed out at interest for the benefit of such of the plaintiffs as are infants, &c.

The cause came on to be heard 1st March, 1790, when the only ques-

tion decided was, relative to the maintenance (*vide ante*, p. 60), and it was referred to the Master, to inquire (*inter alia*) what children the defendant Andrews then had, and had had, and at what times they were respectively born, and in case any of them were dead, then when they respectively died.

*July 11, 1791, the Master made his report, and thereby stated, [*404] that the defendant, Robert Andrews, had issue by his late wife, the following children, and no more; plaintiff Elizabeth, born 1761, Robert, 1762, Catharine, 1764, George, 1765, Charlotte, 1766, Sarah, 1767, Cæsar, 1770, Hugh, 1772, Henry, 1773, Frederick, 1775, Marianne, 1777, Augustus, 1779; and that, besides the above-mentioned children, the defendant, Andrews, had an issue by his said wife, the following children, who were dead; Sarah, born 1760, died 1763; John, born 1769, died 1783; and Charles, born 1776, and died in the same year.

And now the cause coming on for further directions upon the Master's report, the question was, what children should take under the bequest of the residue? 1st. Whether all such children as the defendant Robert should have at the time of his death? 2d. Whether it should be confined to such as were living at the death of Margaret, the testator's widow? Or, 3d. To such children as were living at the time the eldest child attained the age of 21?

Lord CHANCELLOR said, where a time of payment was pointed out, as where a legacy is given to all the children of A. when they shall attain 21, it was too late to say, that the time so pointed out shall [not] regulate among what children the distribution shall be made. (2) It must be among the children *in esse* at the time the eldest attains such age. (a) He said he had often wondered how it came to be so decided, there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children.

(2) See *Prescott v. Long*, 2 Ves. jun. 690; *Hoste v. Pratt*, 3 Ves. 730, and note (1), *ante*, 401.

(a) Where a legacy is given to a class of individuals, it will take in all, who answer the description at the time the gift shall take effect. *Swinton v. Legare*, 2 M'Cord, Ch. 440; *Jenkins v. Freyer*, 4 Paige, 47; *Cole v. Crayon*, 1 Hill, Ch. 322.

Where there is a fixed period for distribution, in a devise to children, all the children born before that time will be let in, and none others. *Myers v. Myers*, 2 M'Cord, Ch. 256.

But if the period is left indefinite, or if the gift is *per verba in presenti*, none but those born before the death of the testator can take. *ib.*; *Jenkins v. Freyer*, 4 Paige, 47; *Van Hook v. Rogers*, 3 Murph. 178. See *Hansford v. Elliott*, 9 Leigh, 79.

Where a testator gives to legatees, who shall be living at the time of actual distribution, the Court will fix a year as the proper period. *Brooke v. Lewis*, 6 Madd. 368.

[The rule laid down by Lord Hardwicke, in *Ellison v. Airey*, 1 Ves. 111, which was followed in the present case, has frequently been stigmatized as a refinement, and as contradicting the intent of the testator; and it has been regretted that the same construction has not been adopted in this respect in wills, as in marriage settlements: the answer to that is, that in marriage settlements, as before marriage, there can be no children to whom it can be applied, such a limitation must of necessity mean all the children, as there is no place in which to draw the line; and in a marriage settlement it seldom happens that the husband and wife, or one of them, has not a life estate, by which the distribution is prevented, till the possibility of more children coming *in esse* is at an end.

In these bequests to children or other persons who are designated as a class, the Court always endeavors to construe the period of distribution as late as it can, in order to include the greatest number of persons within the testator's bounty. The cases upon this subject may be conveniently divided into three classes; 1st, where there is simply a general devise to children or other persons, as a class, in which case it comprehends all persons answering that description at the time of the testator's death. *Hill v. Chapman*, *ante*, 391, 1 Ves. jun. 406; *Viner v. Francis*, *ante*, vol. ii. 658; *Singleton v. Gilbert*, 1 Cox, 68; *Davidson v. Dallas*, 14 Ves. 576. The case of *Martin v. Heathcote*, 2 Eden, 234, is in opposition to these and the other authorities, and may be considered overruled by them. 2d, where there is a previous life estate, in which case all the persons answering the description at the extinction

of that life are included. *Baldwin v. Carver*, Cowp. 209; *Ayton v. Ayton*, 1 Cox, 327; *Attorney-General v. Crispin*, ante, vol. i. 386; *Devisme v. Mello*, *ibid.* 537; *Middleton v. Messenger*, 5 Ves. 136; *Paul v. Compton*, 8 Ves. 375; *Walker v. Shore*, 15 Ves. 122; *Crone v. Odell*, 1 Ba. & Be. 449; afterwards in Dom. Proc. 3 Dow. P. C. 61. The 3d class of cases are those in which, as in the present, the bequest is to children (generally) payable at a certain period (usually twenty-one or marriage), in which case all children are let in, who come into *esse* before the first child attains the period appointed. *Congreve v. Congreve*, ante, vol. i. 530; *Gilmore v. Severn*, *ib.* 532; *Pulsford v. Hunter*, post, 416; *Hughes v. Hughes*, post, 434, and 14 Ves. 206; *Prescott v. Long*, 2 Ves. jun. 692; *Hoste v. Pratt*, 3 Ves. 730; *Barrington v. Tristram*, 5 Ves. 346; *Whitbread v. St. John*, 10 Ves. 152; *Gilbert v. Boorman*, 11 Ves. 238, and it is now settled, that children in *ventre sa mere*, at the period of distribution may take. *Clarke v. Blake*, ante, vol. ii. 320, and the cases cited in the note to it, overruling *Pierson v. Garnet*, *ib.* 47, and *Cooper v. Forbes*, *ib.* 63.

Where there is a devise to persons in a class, though the gift be to them in the plural, and a direction that they should take as tenants in common, and not as joint tenants, yet if there be only one surviving at the period of distribution, such person will take. *Crooke v. Brooke*, 2 Vern. 106; *Doe v. Sheffield*, 13 East, 526, and the same would probably have been determined in the late case of *Smith v. Shouldham*, 6 Dow. P. C. 22, but for a remarkable clause which followed and controlled the previous devise. And a defective enumeration of the persons composing the class, will not prevent any of them from taking; thus, four children have been allowed to take where the bequest was only to three, and three where it was but to two. *Sleech v. Thorington*, 2 Ves. 564; *Tomkins v. Tomkins*, *cit. ib.* and from the Register's book, 19 Ves. 126, n.; *Scott v. Fenhouliet*, 1 Cox, 79; *Stebbing v. Walkey*, ante, vol. ii. 85; *S. C.* 1 Cox, 250; *Humphreys v. Humphreys*, 2 Cox, 184; *Garvey v. Hibbert*, 19 Ves. 125. But if there happens to be no person in existence to answer the description when the period arrives, the Court will not wait to see whether any will come in *esse*. *Godfrey v. Davis*, 6 Ves. 43. Care also must be taken, that a devise to a class of persons should not be after an indefinite failure of issue in another person, as in *Jee v. Audley*, 1 Cox, 324, where a testator gave 1000*l.* to A. and the issue of her body, in default of such issue to be equally divided between the daughters then living, of J. J., and Elizabeth his wife, which would have been good, if it had been to "daughters now living," or "who should be living, at the testator's death," but was void, as according to the present doctrine it would comprehend after-born daughters; and such bequests cannot be good in part, and bad in part; therefore if some of the individuals, composing the class, be incapable of taking, the bequest cannot be altered either into particular bequests to the individuals, or by subdividing the class itself. *Leake v. Robinson*, 2 Meriv. 363. — *Eden.*]

DODSON v. HAY. Rolls, 12–16th Dec.

(Reg. Lib. 1791. A. fol. 82. and 100. Entered *Dodson v. Dearn.*)

When the testator expresses his intention incorrectly, the Court will effect it by supplying proper words. Where money is given to be laid out in land for a place of retirement for testator's sister, "to be forever entailed on her issue," the husband of one of the daughters of the sister entitled, as tenant by the curtesy, to one third. (1) Gift of a residue to children not to be claimed till twenty-two, but the interest given in the mean time is vested. (2)

THOMAS DOWNES WILMOT, by his will, dated 6th February, 1779, devised in these words: "after all my just debts are paid, I give and bequeath unto my only sister Eleanor Dearn, of the city of London, the [*405] annual produce of 2000 guineas, *to be laid out in a piece of land in any part of Great Britain she may chose, for a place of retirement; the said purchase, when made, to be forever entailed on her issue, and, at her decease, the annual produce of such purchase to be yearly and equally divided among her issue, males and females, for the education, maintenance, and support of them. I also give and bequeath unto the children of my said sister, the whole of all the real and personal estate I may die

(1) See *Cunningham v. Moody*, per Lord Hardwicke, C., 1 Ves. 174, 175, agreeably to *Sweetapple v. Bindon*, 2 Vern. 536, above cited, and 1 Roper, Bar. & Fem. 21, 22. With regard to the late alteration made by Lord Eldon's Act, preventing the necessity of an actual investment of money to be laid out in land, the person who would be tenant in tail is absolutely entitled. See that act (40 Geo. 3. c. 58), and *Ex parte Hodges*, 6 Ves. 576, and *Ex parte Frith*, 8 Ves. 609, with reference to it.

(2) See *Hoath v. Hoath*, ante, 2 vol. 3, and the notes; 1 Roper on Legacies, 182, et seq.

possessed of, after paying the above-intended legacy, and those hereinafter mentioned, and it is my particular will and desire, that the children, all of them, be educated with the yearly interest of whatsoever portion of my estate that may fall to each respective child's lot or share, and such portion not to be otherwise claimed or inherited, directly or indirectly, until the said children arrive at the age of 22 years, whether married or single."

The testator had not any real estate. At the death of the testator, and at the time of making his will, Eleanor Dearn had three children, Elizabeth, who afterwards married the plaintiff, and the defendants, Anne Maria, and Thomas Dearn, who were infants.

Soon after the death of the testator, Eleanor Dearn died, without having had any other children, and soon after her death Elizabeth Dearn married the plaintiff, and died soon afterwards, under the age of 22, having had a child who lived but a few days.

Upon a bill filed by the children of Eleanor Dearn, it had been decreed, that the 2000 guineas should be laid out in the purchase of bank annuities, in the name of the Accountant-General, for the benefit of the infants, till it could be laid out in the purchase of lands.

Elizabeth Dodson afterwards dying, the plaintiff filed this supplemental bill against the other infants, and against the executors of the testator, claiming to be entitled, as tenant by the curtesy, to the interest of a third part of 2000 guineas, and likewise claiming to be entitled, as administrator of his wife, to a third part of the residue of the personal estate of the testator.

*Mr. *Hardinge*, Mr. *Lloyd*, and Mr. *Abbot*, for the plaintiff, con- [*406] tended that he was entitled to be tenant by the curtesy, of a third part of the stock purchased with the 2000 guineas; that it was so clear that the wife of the plaintiff took an estate tail under the will of the testator in a third part of that stock, that it would not admit of any argument; and that a husband might be tenant by the curtesy of an equitable estate, and of money to be laid out in land, appeared by the case of *Sweetapple* and *Bindon*, 2 Vern. 536: (3) that the plaintiff's wife's share of the residue was a vested interest in her, though she died before 22, they contended, because it was in the first place given absolutely to her, and the other children, and there was nothing in the subsequent part of the bequest to show that the testator intended it should not be a vested interest; on the contrary, the testator, in a subsequent part of the bequest, gave the interest of the legacy to the children, which alone would be sufficient to make their portions vested, although the interest was given for the purpose of maintenance and education, as appeared by the case of *Hoath v. Hoath* (ante, vol. ii. p. 3).

Mr. *Schwyn*, and Mr. *Romilly*, for defendants, the infants, admitted, that if the plaintiff's wife was tenant in tail, he would be entitled to be tenant by the curtesy, though it was only of money to be laid out in the purchase of land; but they insisted that the plaintiff's wife, and other children of Eleanor Dearn, were not, by the will, tenants in tail; that the testator's intention appeared to be, that, after the estate was purchased, a conveyance should be executed; the estates were then to be forever entailed on the issue of Eleanor Dearn; and, by those words, the testator could not mean that estates tail should be given to them, but that the estates should be settled in such a manner as to be unalienable, as strictly as the rules of law would admit, which could only be done by limiting one third of the

(3) S. P.; also *Cunningham v. Moody*, 1 Ves. 174, 176.

estate to be purchased to each of the children of Eleanor Dearn for life, with remainder to their first and other sons in tail, with remainder to their daughters in tail, with cross remainder in tail; that the testator had himself directed how the estate should go to Eleanor Dearn, but, with respect to her issue, he required a conveyance to be made, and the Court would take care that the conveyance should be so framed as best to effectuate his intention; that this was the constant course of the Court, not only [*407] in the case of marriage articles, which were to be executed by the Court, but also in the case of wills, which contained trusts of executory; that this doctrine was expressly laid down by Lord Cowper in the *Earl of Stamford v. Hobart*, Fearn's *Contingent Remainders*, vol. i. p. 175 (4th edit.), and had been recognized and acted on in many cases, particularly in *White and Carter*, (4) Amb. 670.

Mr. *Richards*, for Thomas Dearn (the husband of Eleanor Dearn, one of the executors of the testator and administrator of his wife, who was the next of kin of the testator), insisted, that the share of the plaintiff's wife in the residue was not a vested interest, but, by her death under 22, was lapsed, and belonged to the next of kin. He said that the cases where interest had been given for a legacy, were not applicable to the present case, because the giving interest was merely a circumstance to show the testator's intention, and if, although he gave interest, he were to declare that the legacy should not be vested if the legatee died under a certain age, there was no doubt that it would not vest before that age; that in the present case, the testator had used the strongest expressions to show that that was his intention; he had said, not that the legacy should not be paid, but that it should not be inherited till the child attained 22, and the word *inherit* must be used as perfectly synonymous with vested, because it was a word as applicable to a future and reversionary, as to a present and immediate, interest.

This day his Honor gave judgment.

Master of the Rolls. (5)—The bequest is, "I give to my sister Eleanor

(4) First heard before Lord Northington, C. (Vide 2 Eden, Ca. Lord N. 366) and afterwards affirmed by Lord Camden, ubi supra (Ambler, 670).

(5) The Editor subjoins a succinct report of this judgment from the conjoint notes of Lord Colchester and Sir S. Romilly, who were of counsel in the cause on different sides (ut supra), and who adjusted it as follows after the cause was over:—

Master of the Rolls. — It is certainly true that the Court, in carrying into execution trusts executory (which this undoubtedly is), will give estates for life to all the persons who were objects of the testator's bounty, and who were living at the time of making the will, if it can discover that that was the testator's intention. The only question, therefore, in this case is, whether it was the testator's intention that the children of Eleanor Dearn should take only estates for life; but I can find no words in this bequest which demonstrate any such intention in the testator. His intention seems to have been, that all the children of Eleanor Dearn should take such estates as they might transmit to their posterity. In *White v. Carter*, the only question seems to have been, whether the intention of the testator was, that the children should take as purchasers or not. Lord Camden thinks that the testator intended they should take as purchasers, and he relied on the word "sons," as demonstrative of that intent. In the present case, Eleanor Dearn might have had many children born after the death of the testator; and it is impossible to contend that, under this bequest, it was not intended that they should take, as well as the other children; and yet, not being in existence at the death of the testator, they would not, by law, take estates for life. The limitation to them must have been in tail. The testator, however, could not have intended to give different estates to the different children of Eleanor Dearn; estates for life to those who were in being, and estates tail to the after-born children. I think, therefore, that the plaintiff's wife took an estate tail, and that he is tenant by the curtesy.

With respect to the second question, I think the share of the residue vested in the plaintiff's wife, and that he, as her administrator, is entitled to it. The testator's intention seems to have been, that the interest alone should be paid to the children till twenty-two, and that they should not till then have the absolute control over it. He first gives it to them absolutely, and what follows is only to fix the time when they shall receive it. — Lord Colchester and Sir Samuel Romilly's joint MS. note.

Dearn, the annual produce of 2000 guineas, to be laid out in a piece of land, which she may chose for her retirement; the said purchase, when made, to be forever entailed upon her issue; and at her decease, the annual produce of such purchase to be divided among her issue, male and female, for the education, maintenance, and support of them." The bill is filed by the husband of one of the daughters of Eleanor Dearn, insisting that the land, if purchased, ought to be settled on Eleanor Dearn for life, remainder to her sons and daughters in tail; and that he having married one of the daughters, and had issue, is entitled, as tenant by the curtesy, to her third.

*It has not been contended by any of the parties, that Elizabeth [*408] Dearn took more than an estate for life; and indeed it cannot be contended that she took more.

The gift being of money to be laid out in land, it might have been contended, that she took an estate tail, on the ground that all her issue were intended to take; but that construction could not prevail in this case, where the produce is to be divided between her issue male and female. I know of no construction but one that can take place, viz. that she took only for life.

Then the question is, what the testator meant by issue?

He meant, they should take such an estate as they could transmit through an indefinite line of issue.

It is contended that the Court will adopt all the words of conveyance, so as to effectuate the intention of the testator; and that the Court will not use the words of the testator, but where they are informal will supply formal words for that purpose. And the Earl of *Stamford v. Hobart*, 1 Bro. P. C. 288, and *White v. Carter*, Amb. 670, are cited to prove this.

The Earl of *Stamford v. Hobart*, arose on Sir John Maynard's will. The Lord CHANCELLOR there declared, "That in matters executory, as in the case of articles, or a will directing a conveyance, where the words of the articles or will were improper, or informal, the Court would not decree a conveyance, according to such improper or informal expressions in the articles or will; but would order the conveyance or settlement to be made in a proper and legal manner, so as might best answer the intent of the parties." This establishes the rule, that where a court of equity carries into execution a conveyance with informal words, it will carry the intention of the party into execution. See, then, what was done in that case of the Earl of *Stamford v. Hobart*; all the Court did, was to interpose such an estate as would support the remainders.

White v. Carter, Amb. 670, was before Lord Camden. (6) The question was, what was the intention of the testator as to the issue, whether they were to take as purchasers or not, and the decree went on the ground of its being his intention that the issue should take as purchasers.

*Wherever I can find the intention of the testator, it is indifferent [*409] whether it is the case of a trust executory, or of a legal estate; whether the act is complete, or there is a future act to be done. This rule is laid down in *Jones v. Morgan* (ante, vol. i. p. 206).

In *Austen v. Taylor*, Amb. 376, (a) it was held, the intent of the testator must prevail.

In this will, I can find nothing to show the intent of the testator to

(6) Upon a rehearing, from the decree of Lord Northington, which Lord Camden affirmed. See it reported, 2 Eden, Ca. Lord North. 366; and see Fearn, Cont. Rem.

(a) S. C. 1 Eden, 361.

select the sons as objects of bounty, so as to raise estates tail from them without giving them the same estates. If I could find such words, I would declare them purchasers, with estates tail to their issue.

Here Eleanor Dearn might have many children born after the devise, or unborn at the death of the testator; they must take estates of inheritance, or they must take estates for life without any estates of inheritance grafted upon them. To take the construction of Mr. Romilly, I must make a difference between the children then born, and those unborn; for which I see no ground. The testator meant the estate to be entailed forever; for this purpose, he has given it to the issue as purchasers. It must be to the issue in tail, for he had no intent to make the children of Eleanor Dearn stocks, upon which to engraft estates-tail, but meant them to take estates of inheritance.

Then the husband will be entitled, under the case of *Sweetapple v. Bindon*, to the tenant by the curtesy.

Then, as to the gift of the residue, "I give and bequeath to the children of my said sister, the whole of all the real and personal estate I may die possessed of, after paying the above-intended legacy and those hereinafter mentioned: and it is my particular will and desire, that the children, all of them, be educated with the yearly interest of whatever portion of my estate that may fall to each respective child's lot or share; and such portion not to be otherwise claimed or inherited, directly or indirectly, until the said children arrive at the age of 22 years, whether married or single."

The question is, whether he meant to give any interest in the [*410] residue to any child, till it should attain the age of 22. The *words in the first part of the bequest are absolute. The question is, whether the remainder will prevent them from being so. The interest to be applied, is of such portion as may fall to the lot or share of each child. This severs the joint-tenancy. Where the interest of the fund is given, it is *prima facie* evidence of the fund's vesting. Then the question is, whether vague words following, shall be sufficient to control clear words from operating. The words are, "That the portions shall not be claimed or inherited, until the children attain 22." It would be a monstrous construction, to say, that these words prevented the vesting, unless the children should attain 22. If a child died, leaving a child, could the testator mean to exclude that child? Yet that child must be excluded, if this construction should prevail. But a natural construction may be put upon the words, that he gave the legacy absolutely — that he gave the interest immediately; but the legatee was not to command the principal till 22 years of age. Then it is a vested legacy, though the beneficial use is suspended. (b)

Then I must declare the plaintiff entitled, as tenant by the curtesy, to the third part of the 2000 guineas, (c) and that, in right of his wife, he is entitled to a share of the residue, as being a vested interest in her, though the control thereof was suspended till she should have attained 22 years of age. (d)

(b) As to the cases in which the interest of a fund being given, it has been considered *prima facie* evidence of an intention to vest, vide *Walcot v. Hall*, ante, vol. ii. 305; and for the cases upon the general doctrine, vide *Dawson v. Killeit*, ante, vol. i. 119, and the Editor's note to it. — *Eden*.

(c) See *Ram on Assets*, ch. 14, § 2, p. 211, 212.

(d) See *Ram on Assets*, ch. 6, § 14, p. 125, 126.

GRIFFITH v. HARRISON, and Others. (1)

Lincoln's-Inn-Hall, 16th and 17th Dec.

(Reg. Lib. 1790. A. fol. 70. b.)

Under a power to devise among children, the testatrix gives to A. (one of the children) for life, remainder to trustees to preserve contingent remainders, remainder to first and other sons, &c. remainder to B. (another son), in the same way. Q. whether, the excess being void, the power is null, and the heir-at-law shall take, or the sons should take successive life estates, as good under the power; or whether, to maintain the general intent, the sons shall take estates tail. (1)

GUYON GRIFFITH, D. D., made his will, bearing date the 27th May, 1777, and, after making the same, became seised in fee of a freehold estate, called Vawtorts, situate in the parish of Sabridgeworth, com. Hertford, and of a reversion of lands adjoining to it, expectant on the death of Ann Fowler, widow, since deceased, and became also seised of copyhold lands, being part of the said estate of Vawtorts.

The testator being so seised or entitled, and having surrendered the copyholds to the use of his will, made a codicil to his will, bearing date 7th March, 1781, duly attested to pass real *estates, [*411] whereby he gave and devised the farm called Vawtorts, together with the reversion of the adjoining tenement, to Frances Griffith, his then wife for life, and after her decease, to such child or children of him the said testator, as she should judge most proper to bequeath the same to, by her will.

The testator afterwards made a second codicil, dated 31st December, 1783, duly executed and attested, confirming his former will and codicil, and thereby gave, devised, and bequeathed all that estate called Vawtorts, both freehold and copyhold, of which he was then possessed, and all the messuages, lands, tenements, and hereditaments thereto belonging, to the use of his wife, Frances Griffith, during her life, and directed and empowered her to give and devise the same to any one or more child or children of him the said testator, by her the said Frances Griffith, in such manner, share, and proportion, as she should direct, in and by her last will and testament, in writing, duly executed, but so as the said estate might not be divided, but transmitted whole and entire to his heirs.

And reciting that he was entitled, after the decease of Ann Fowler, to the reversion of an estate, messuages, and lands adjoining the messuages and lands called Vawtorts, he devised the same to his wife, for life, and empowered her to devise the same to such one or more of his children as she should appoint by her will, and empowered his wife to grant leases, not exceeding 21 years; and declared it to be his will and intention, that the estate and lands called Vawtorts, and the other estate adjoining, to which he was so entitled in reversion, should be considered as one estate, and be transmitted entire to his family.

The testator died in January, 1784, without revoking his will or codicil, leaving Frances, his widow, and also leaving the plaintiff, his eldest son and heir-at-law, and customary heir, and Thomas Harrison Griffith, Guyon Griffith the younger, Elizabeth Griffith, and Charlotte Griffith (which Thomas Harrison Griffith, Elizabeth, and Charlotte, are three of the defendants), his only children, him surviving.

(1) The case was sent to the Court of King's Bench, where it was twice argued. The Judges there differing in opinion, and returning contrary certificates, the bill was ultimately dismissed, according to the usual practice in such doubtful cases. Vide 4 T. Rep. 737, &c. See also Sugden on Powers, 530, et seq.

Frances, the widow, entered into the part of the estate to which she was entitled in possession, and was admitted to the copyhold, and continued in the enjoyment thereof till her death.

[*412] *She died 12th Jan. 1786, having made her will, duly executed and attested for passing real estates, whereby she gave and devised all the estates which were devised to her by the said codicils, to her son Guyon Griffith for life, *sans waste*; remainder to the defendants, John and Moses Yeldham, as trustees to preserve contingent remainders; remainder to the first and other sons of Guyon Griffith in tail male; remainder to the first and other daughters of said Guyon Griffith in tail general; remainder to the plaintiff for life, *sans waste*; remainder to the trustees to preserve contingent remainders; remainder to the first and other sons of plaintiff in tail; remainder to the defendant, Thomas Harrison Griffith; remainder to others of the defendants successively for life; remainder to their first and other sons; remainder to the daughters, with an ultimate remainder to the right heir of the testator.

Guyon Griffith, the younger, the devisee for life under his mother's appointment, died 21st October, 1789, intestate, unmarried, and leaving no child, but leaving the plaintiff his heir-at-law, and customary heir.

The plaintiff, so circumstanced, contracted with the defendant, Harrison, for the sale of the estate at the sum of 1200*l.*, and an article was for that purpose entered into; but the defendant objecting to the plaintiff's title, this bill was filed for a specific performance of the purchase; plaintiff insisting by the bill, that the execution of the power was void, not having followed the terms thereof; for that Frances Griffith had no authority to limit the premises to the children or issue of the plaintiff, or any of his brothers and sisters, and therefore that the disposition of the premises, by the will of Frances, not having strictly pursued the words of the power, was wholly void and ineffectual; that therefore the estate had descended upon the plaintiff as heir-at-law, and customary heir of the testator his father (subject to the estate for life of Ann Fowler, in part thereof, which had since fallen into possession by her death), in the same manner, as if Frances, the widow, had made no disposition of it.

The defendant, Harrison, by his answer, submitted to the Court, whether the will of Frances Griffith was a good execution of the power given to her by the codicils to her husband's will, and said he was ready to complete the purchase, if the plaintiff could make a good title.

[*413] *The other defendants submitted the same question to the Court.

The cause came on to be heard 27th July, 1791, when it was referred to the Master, to see whether a good title could be made, and further directions were reserved till the Master should have made his report.

The Master made his report 2d December, 1791, and certified that a good title could be made to the premises.

To this report, the defendant filed a general exception, for that the Master ought to have certified that a good title could not be made.

This exception came on now to be argued.

Mr. *Mansfield*, in support of the exception. By the power, Mrs. Griffith had authority to appoint the estate among her children by the testator; there is no question she might give the whole to any one child; but, by limiting it to one son for life only, and then giving it to the sons and daughters of that son, she has exceeded her authority; but still Moses Griffith, the plaintiff, cannot make a good title, and the Master

should have reported that he could not; because there is an estate limited by the devise to Guyon for life, and although the subsequent estates are void, yet the next estate is to the plaintiff for life only, and the subsequent takers may also take for life, those limitations being good under the power.

Mr. *Solicitor-General*, and Mr. *Stanley*, for the plaintiff, contended, that he could make a good title, and must be considered as tenant in tail. (They stated the wills of the first testator, and of the widow, and the facts as to Guyon Griffith, the younger.) Upon the death of Guyon, Moses took, either as tenant for life under the power, or as heir-at-law to the first testator. The best doctrine as to the widow's will, is to say it is a mere nullity, not an execution of the power. It cannot be said to be according to the intention of the testator (which it was the intention of the testatrix to perform) to give successive life estates, nor was it her intention to give such; or that the second son in remainder under her will, should take anything thereby, whilst there were children living of the first. To make out this point, Mr. *Mansfield* must *consider [*414] the first-named son as taking an estate for life only. He must then strike all the intermediate estates out of the will, and consider the estate as passing immediately to the next-named son. In *Robinson v. Hardcastle*, 2 Term, Rep. 241, Mr. Justice *Buller* held, that, in order to give effect to a general intent, the Court would raise an estate tail to the first son. He referred to the cases of *Pitt v. Jackson* (ante, vol. ii. p. 51), where it was held an estate-tail in Mary, to preserve the general intent; and also to *Chapman v. Brown*, 3 Burrow, 1626; and, upon the whole, he was clearly of opinion, that James Dunn took an estate-tail. If this judgment be right, Guyon Griffith took an estate-tail, which being at an end, Moses, the plaintiff, takes an estate-tail also under the appointment; and if the appointment is void, he takes a fee as heir-at-law; or it might be contended, that the appointment for life being bad, the appointees would take absolutely; and if so, Moses would take, as heir-at-law of his brother, and in either way could make a good title.

Mr. *Mansfield*, in reply. There seems to be a great difficulty in showing what estate the plaintiff takes; the gentlemen contend, he may take either an estate in fee, or an estate-tail; but there is no ground to say he takes either the one or the other. There is no case that will support either. *Robinson v. Hardcastle* has no reasoning to this purpose; it is upon quite a different point. In that case, there was a power to appoint to any of the children who were then unborn, but it was impossible to give to unborn children for life, with limitations to their descendants. Where a power is executed, it refers to the original deed giving the power, and no limitation can be good in the deed by which the power is executed, that would not be good in the original deed; and therefore it was that the appointment in that case was not good. The case of *Pitt v. Jackson*, under which it is contended that Moses Griffith, the plaintiff, took an estate-tail, is now the subject of an appeal, which stands for judgment; and there has been no decision in principle as to that point. *Chapman v. Brown* has also no relation to that point; the Court thought themselves bound by the words. There is nothing in that case to show, that where an estate is given to A. for life, remainder to his issue in tail; that, because the gift to the issue was bad, it should raise an estate-tail in A. In *Robinson v. Robinson*, 1 Bur. 38, it was construed an estate-tail, because otherwise effect could not be given to the intent; but that has not been done where *there was an express estate for life. There is [*415]

no case, that the Court can substitute one estate for another. Here the children were in being, to whom life-estates might be limited. She limits to them for life, which it was competent for her to do. It does not follow, from her giving estates to the issue, that she did not mean them to take successively. Then the intermediate gifts being bad, it is the same as if the words giving them did not stand in the will. Giving the children estates for life, will not disappoint the intention of the original testator; it will not defeat the disposition of the fee. The only effect will be, that the younger children will take estates for life, in preference to the children of the elder children. In the case of the Duke of *Devonshire v. Cavendish*, the limitations were held good, and that Lord George was entitled for life: that case is, so far, an answer to the argument; and there is no distinguishing that case from this, as to this point. The gifts, therefore, to the children, for life, are good, and the intermediate remainders cannot make them otherwise.

LORD CHANCELLOR said, it did not appear to him that this was an estate-tail: it is argued that, because the intermediate limitations are void, they must be struck out, and that then there are life-estates given to all the children; but it is not clear that the testatrix meant the second-named son should take, whilst there was issue living of the one named before.

The next day Mr. *Solicitor-General* again enumerated the cases cited before, and added those of *Goodright v. Cornish*, Salk. 226; and *Harris v. Barnes*, 4 Bur. 2157, as to the construction of wills, to preserve a general intent.

LORD CHANCELLOR said, it seemed clear that, where the first estate, given under a power, is removed, as being a void execution of it, the next, if valid, is brought forward; and that the proposition was clear, that the effect would be the same, where a man had a power given him to make a will, or derived the power from his interest:

But directed a case to be sent to the Court of King's Bench. (2) (a)

(2) After two arguments, and different certificates from the judges, who dissented in opinion, the bill was ultimately dismissed, agreeably to the usual practice in such cases. See the arguments and certificates in King's Bench, 4 T. Rep. 737, et seq.

(a) See Sugden on Powers (4th Lond. ed.), ch. 9, § 8, p. 539, 539; ib. § 5, p. 504, et seq.; Pitt v. Jackson, 2 Bro. C. C. 51.

*PULSFORD v. HUNTER.

[*416]

JENNINGS v. HUNTER.

Lincoln's-Inn-Hall, 17th Jan. 1792.

(No Entry.)

Where a legacy is of the "value" of securities, &c. though the specification be varied, the legacy is not adeemed. (1) A legacy of a sum to be divided among children. All those born before the time of division take. (2) "Maintenance" not equivalent to "interest," for the purpose of vesting a legacy. (3) No maintenance shall be given when the parent is of ability to support the children. (4)

WILLIAM RICHARDS, by will, dated 3d September, 1775, devised his freehold estates in the city of London, and elsewhere, to trustees for the term of ninety-nine years, and subject to the term, as to one undivided moiety, during the life of his daughter Mary Pulsford, to pay the rents and profits to her for her separate use, remainder to the use of all and every the child and children of Mary Pulsford, equally to be divided between them, if more than one, share and share alike, as tenants in common, and of the several and respective heirs of the body or bodies of all such child or children issuing, with survivorship, among them; remainder to Jane Jennings, another daughter of testator, to her separate use, and to her issue in tail in like manner; and as to the other undivided moiety, he gave the same to the trustees, in trust, during the life of his said daughter Jane Jennings, to pay the rents, &c. to her sole and separate use; remainder to her child or children in tail; remainder to the separate use of his daughter Mary Pulsford, in like manner, with remainder over, in case of default of issue of both his said daughters.

The trusts of the term of ninety-nine years were declared to be, that the trustees and the survivor of them should, after the testator's death, and during the lives of his said two daughters, and the survivor of them, receive and take out of the rents and profits of the premises comprised in the term, so much money as they, or the survivors of them, should think or find necessary for the maintenance and education of the children of his daughters begotten or to be begotten, and pay the same, for that purpose, in such manner, shares, and proportions, as they or the survivors of them should, in their discretion, think fit, without any regard or consideration being had to either of his daughters having more children than the other of them, it being his intention that his grandchildren should be educated out of the whole rents and profits, to such extent as the trustees should think fit, before any division should be made of the profits between his daughters, and then the surplus was to be divided between the *persons entitled to the real estate of freehold, in the propor-[*417] tions in which they were respectively entitled to the same; then the testator gave his leasehold, and other residuary personal estates, to trustees, upon trust to pay the rents, interest, and dividends of a moiety

(1) See 1 Rep. on Legacies, 29, &c.

(2) Vide *Andrews v. Partington*, ante, 401, and the Editor's note.

(3) Vide 1 Rep. on Legacies, 186, et seq., and Editor's note to *Hoath v. Hoath*, ante, 2 vol. 3.

(4) But see the alteration in the practice of the Court which afterwards took place, and which now subsists, in the Editor's note to *Hughes v. Hughes*, ante, 1 vol. 387. { See also *Burnet v. Burnet*, 1 Bro. C. C. 179, and note (1) and cases cited. }

[*420] *But Lord CHANCELLOR held they should not have it; and reserved liberty for them to apply for a maintenance, either out of the profits of the term, or of the specific legacy, in case it should become necessary. (7)

(7) But see the Editor's note to *Hughes v. Hughes*, ante, 1 vol. 387.

1 Bro. C. C. 387, 388, and notes; 1 Macpherson on Infants, ch. 22, § 2, p. 219, et seq.; *Andrews v. Partington*, ante, 60, note (a) and cases cited, and note (1) to that case; *Billingley v. Critchet*, 1 Bro. C. C. 268.

FINCH, D. D. and Others, v. INGLIS, and Others.

Lincoln's-Inn-Hall, 17th Jan.

(Reg. Lib. 1791. A. fol. 146. b.)

Testator having given to charities, legacies, and also a residue, in bank stock; and having no bank stock at his decease, but having three per cent. annuities, which would satisfy the legacies in that shape, and leave a residue, but if sold would not purchase bank stock to satisfy the legacies, in that form: a decree taken by consent, that the legacies should be paid in three per cents. according to the sums given. An infant not opposing, his legacy ordered to be paid in the same manner; but if the testator's property had been sufficient, the legacies should have been paid in bank stock. (1)

THE bill stated, that testator, George Stanbridge, being at his death possessed of a considerable personal estate, made and published his last will and testament, dated the 23d of May, 1780, whereby he gave and devised as follows: "After all my debts and funeral expenses are fully paid and satisfied, my will and desire is, that my personal estate, of what kind soever, shall be as soon as possible sold (except such household goods and utensils as my dear wife Mary Stanbridge shall think proper to retain and have for her own use or otherwise); and the moneys to arise by such sale, together with all such sum or sums of money as shall be due and owing to me at the time of my decease, may be placed out in some of the public funds, in the name of my executors and executrix hereinafter named, and to be applied in manner as I shall hereafter direct. First, I give and bequeath unto my dear wife the sum of 100*l.*, of good and lawful money of Great Britain, to be paid to her for her own sole use and benefit, to be disposed of by her as she shall think proper at the time of her decease. Also, I give to my said dear wife, the interest of all such moneys as I shall die possessed of, or as shall be purchased with the residue of my estate, after my decease, to and for her own sole use and benefit, as long as she shall happen to live (except the legacies hereinafter by me given). Also, I give and bequeath unto George Young, son of Christopher Young, of Old-street, in the county of Middlesex, carpenter, 100*l.* bank stock, to be transferred to him as soon as may be after my decease. Also, I give and bequeath unto Rebecca Coleman, and unto Rebecca Cadd, of Edmonton, the sum of 3*l.* a year, to be paid to the said Rebecca Coleman, and her daughter Rebecca Cadd, and to the survivor of them, as long as they should happen to live, the same [*421] to be paid half-yearly, as the interest shall be *received; the same to commence and be paid at the first half-yearly payment as shall be received after my decease. Also, I give unto Mrs. Elizabeth

(1) See *Fonnereau v. Poyntz*, ante, 1 vol. 472, with the references there; and in the Editor's note. Also 2 Roper on Leg. 319, et seq.

Billings, and to Mrs. Ann Billings, a ring each of one guinea value. Also, I give unto Mr. George King, and to his wife, each a ring of one guinea value; and to Mrs. Hanes, and her niece each, a ring of one guinea value; and to Mr. Samuel Draper, schoolmaster, and his wife each, a ring of one guinea value. Also, I give and bequeath unto Mr. George Herbert, senior, of Waltham Holy Cross, in the county of Essex, and to his son George Herbert each, the sum of 100*l.* bank stock, to be transferred to them as soon as conveniently may be after the decease of my said wife. Also, I give and bequeath unto the society known by the name of St. Alphage Society, and who now hold their meeting every Sunday evening, at the school-room in St. Lawrence's Church, near Guildhall, London, the sum of 200*l.* bank stock, the same to be transferred into the name of the treasurer of the said society for the time being, after the decease of my said wife, in trust, to pay and apply the interest and dividends arising therefrom, from time to time, for the use and benefit of the children under their care, if the said society shall subsist at the time of my decease. Also, I give and bequeath unto the Vicar and churchwardens for the time being, of the parish of Edmonton aforesaid, and to the trustees of the gift of Thomas Styles, Esq., the sum of 400*l.* bank stock, to be transferred into their names as soon as conveniently may be after the decease of my said wife, in trust, that they the said Vicar and churchwardens, and the trustees of the gift of Thomas Styles, Esq., for the time being, do and shall from time to time receive the interest and dividends of the said 400*l.* bank stock, and lay out the same in bread, to be distributed from Michaelmas to Lady-day every year, to the poor of the said parish of Edmonton forever. Also, I give and bequeath unto the treasurer for the time being, of the society who call themselves the governors of the London Lying-in-Hospital for married women, the sum of 300*l.* bank stock, to be transferred to them as soon as conveniently may be after the decease of my wife; in trust, to apply the interest thereof to the use and benefit of the said hospital," He gave in a similar manner to the Vicar, churchwardens, and committee of the Girls' school at Edmonton, 700*l.* bank stock. He gave to William Soul 100*l.* bank stock, after the decease of his wife; *and to George Soul, son of said [*422] William Soul, 100*l.*, to be transferred into his name, and desired that William Soul, the father, should receive the interest for his maintenance; and to several other charities different sums in bank stock, and, among the rest, 400*l.* bank stock, to the Society for the Relief of Persons confined for Small Debts, to be transferred to them after the death of his wife, and to be applied to the uses of that charity; and gave the residue of the bank stock to the Vicar, churchwardens, and committee of the Girls' school, at Edmonton, to pay and apply the interest to the uses of that charity; and appointed Thomas Tuck and Lawrence Wood executors.

The testator afterwards made a codicil, dated 20th September, 1782, by which he revoked some trifling legacies, and the gift of 700*l.* to the Girls' school at Edmonton, and, in lieu thereof, gave 1000*l.* 3 per cents. standing in his name. He also revoked the gift of 400*l.* stock, to the Society for the Relief of Persons confined for Small Debts, and gave 200*l.* of the like stock for the same purposes, and appointed the defendant Inglis executor, instead of Thomas Tuck.

The testator died 19th October, 1782, leaving his wife surviving him, who, together with the other executors, proved the will, took possession of the property, and paid the debts of the testator, and invested such of his

property as Mary did not take under the will, in one of the public funds, and Mary received the interest till her death, which happened about the 15th March, 1788.

The bill was filed by the plaintiffs, the treasurers of the several charities to whom the bequests were given, against the executors, and also against the Vicar of Edmonton, and the treasurer of the Girls' school, and the churchwardens of that parish, praying proper accounts, and particularly of what was due on account of the legacies; and that it might be declared how, and in what manner, and out of what part of the assets of the testator the same should be paid, and for proper directions.

The defendants, the executors, set forth an account of the testator's stock, by which it appeared, that he had various sums in the 4 and [*423] 3 per cent. bank annuities; but that he was not, at his death, possessed of or entitled to any bank stock; that the defendants were obliged to sell out some of his stock to pay debts and legacies: and that there was still standing in his name 2000*l.* 3 per cents., 14,000*l.* 4 per cents., and 154*l.* 4 per cent. bank annuities, which they were willing to transfer; but apprehended that such personal estate would not be sufficient to pay the annuity, and all the other legacies.

The other defendants (the Vicar, &c. of Edmonton) claimed to be entitled to the legacy of 1000*l.* 3 per cent. reduced annuities, given to the Girls' school, and submitted that the same was a specific and not a general legacy; and also claimed other sums of 4000*l.* bank stock, and 500*l.* bank stock, given to them on certain trusts by the will; and also the residue of testator's personal estate under the will.

The cause came on to be heard 27th November, 1789, when it was ordered, that it should be referred to the Master, to take an account of the personal estate of testator, and what bank stock, and other public securities, the testator was possessed of or entitled to at the time of making his will and his codicil, and at the time of his death; and of the amount of his debts; and that his personal estate should be applied in payment of his debts and funeral expenses in a course of administration and payment of his legacies, except the legacies of bank stock, as to which his Lordship reserved the consideration of further directions till after the Master should have made his report.

The Master made his report 25th November, 1791, and (among other things) stated that he had inquired what bank stock and other public securities the testator was possessed of at the three periods before pointed out; and he found that the testator was at no one of those periods possessed of any capital bank stock, but was, at the time of making the will, entitled to 2250*l.* bank 3 per cent. reduced annuities, 1725*l.* bank 4 per cent. annuities, which then stood in his name at the bank; and, at the time of making his codicil, and of his death, he was entitled to 2250*l.* bank 3 per cent. reduced annuities, 1700*l.* bank 4 per cent. annuities, 100*l.* and 350*l.* bank 3 per cent. consol. annuities; and he found that the executors had sold out certain funds, with the amount of which he charged them; and that there were then standing, in the name of the testator, in the [*424] books of the Bank of England, 2000*l.* bank 3 per cent. reduced annuities, 1400*l.* bank 4 per cent. annuities, and 100*l.* and 250*l.* bank 3 per cent. consol. annuities, out of which 2000*l.* bank reduced annuities, he found that 1000*l.* like annuities were specifically given by the codicil to the Vicar, &c. of the Girls' school, at Edmonton; and he found that the debts, funeral expenses, and pecuniary legacies had been paid by the executors; and he found that the testator had given, by his will

and codicil, the several specific legacies in bank stock particularly mentioned in the third schedule to his report (being the legacies of bank stock to the plaintiffs), amounting together to the sum of 2500*l.*, but he had not computed interests on these last-mentioned legacies, it appearing to him that the testator had not any bank stock, as before stated.

Mr. *Solicitor-General*, and Mr. *Finch*, for the plaintiffs, said that, if the legacies were to be taken as bank stock, there would not be nearly sufficient to pay them; in that case, they must abate in proportion, for it must be considered (the testator having no bank stock) either as being a sum equal to the purchase of so much bank stock, or a direction to the executors to purchase so much bank stock, in order to transfer it to the legatees; in both cases the fund would be insufficient, nearly to one half the amount; but if taken in three per cent. the fund would be sufficient to pay all; then it would amount to a direction, that the interest of the stock in his possession should be paid to the wife for life, and then transferred to the legatees, not new funds purchased; that this would be agreeable to the case of *Fonnereau v. Poyntz* (ante, vol. i. p. 472), where Lord Chancellor thought the testatrix could not mean so much a year long annuities, because the fund would not pay a tenth part of the legacies, but so much to be raised by the sale of long annuities.

Mr. *Mitford*, and Mr. *Grimwood*, for the trustees of the Girls' school at Edmonton, the residuary legatee.

The testator uses the term "public funds," whereas bank stock is not a public fund, but only the stock of a trading company.

Then with respect to the residue, he says, "as to the rest and residue of the bank stock;" these words are material, for if the *leg- [*425] acies before given are to be paid in bank stock, there will be no residue; he has clearly intended his estate to be laid out in some of the public funds, and has used the term *bank stock* to express *stocks transferable at the bank*; he intended it should be laid out in 3 per-cent. annuities, and intended that as the fund, for payment of the legacies, not the capital stock of the Bank of England.

By the codicil, he revokes some of the legacies, and gives different sums in the like stock. He could not mean to refer to bank stock. The words are such as, at least, to raise an ambiguity, which will introduce parol evidence.

LORD CHANCELLOR. In order to make a decree to pay the legacies in 3 per cents., I must introduce evidence in order to show the state of his property, for if it was sufficient to pay the whole of the legacies, they must be paid in bank stock; if it is to be considered as a latent ambiguity, it must be by reference to the state of his funds at the time of making the will. (a) The expense of making that inquiry would exhaust the fund; therefore it will be better to take a decree, by consent, that the legacies shall be considered as legacies of 3 per cent. and divided according to the sums given.

The decree was therefore taken by consent of the other parties, and as not opposed by the infant, the interest of whose share was ordered to be paid to his father, there being a direction to that purpose in the will. (b)

(a) See *Fonnereau v. Poyntz*, 1 Bro. C. C. 480, note (a), and cases cited to this point; *Stephenson v. Heathcote*, 1 Eden, 44; *Andrews v. Emmott*, 2 Bro. C. C. 297.

(b) See 2 Macpherson on Infants, ch. 40 (Lond. edit. 1842), p. 544.

EDWARDS v. JENKINS.

[Vide S. C. 2 Dick. 755.] Lincoln's-Inn-Hall, 19th Jan.

(Reg. Lib. 1791. A. fol. 58. b.)

Injunction granted on amended bill, on special motion, without affidavit, after injunction dissolved on the original bill. (1)

THIS was an injunction bill to stay proceedings on a bond, and the cause at law was at issue; an injunction had been obtained for want of an answer, and on coming in of the answer and motion to dissolve the injunction, exceptions were shown for cause, but the exceptions were disallowed.

The bill was amended by inserting some fresh charges, and new-modeling others, and the defendants having obtained time to answer, [*426] plaintiff moved specially, on notice, and on an affidavit *swearing generally as to the equity, but not circumstantially as to all the facts charged in the amended bill, the discovery whereof were material to furnish evidence of the equity insisted upon.

Mr. *Richards*, for defendant, objected that the material fact on which the equity was grounded (viz. whether the plaintiff knew that a sum of 100*l.* had been paid in the cause) had been unequivocally stated in the former answer so as to destroy the equity of the bill, and that there was no new equity in the amended bill, though he admitted there were material circumstances charged for discovery.

Mr. *Simeon*, for the plaintiff, contended, that the defendant should not be heard to make any objection, not having put in his answer; that on special motion the injunction might be granted [on] or amended [bill] for want of an answer, even when the injunction had been dissolved on the merits on the original bill. 3 Atk. 694; Anon. 26 May, 1749, and Amb. 104; 2 Vesey, 19, *Travers v. Stafford*; and that, here, the injunction had not ever been dissolved on the merits, but on exceptions not holding, which was owing to a want of charges to support the exception, and that plaintiff must have a discovery before the trial at law, consequently an injunction, and, for that purpose, had introduced new charges.

LORD CHANCELLOR mentioned a case of *Walker v. Baxter*, 14th March, 1746, where Lord Hardwicke had made such order on a motion of course, but thought the latter cases and practice overturned that case; that if the amendments were material to raise an equity, and were new allegations, it would, on special motion, entitle the plaintiff to an injunction until answer, or further order, without any affidavit in support of the amendment or equity of the bill; (2) the Court deciding, on special motion, on the amended bill, what it does, of course, on the original bill; and ordered an injunction accordingly. (2) (a)

(1) This report was copied by Mr. Brown from the note of Mr. Simeon. See Mr. Dickens the Registrar's statement, in his contemporary report of this case, of the course of the Court, 2 Dick. 755, &c., et vide Lord Hardwicke C., in *Travers v. Lord Stafford*, 2 Ves. 19, 21; *Bliss v. Boscawen*, 2 Ves. & Beam. 101; *James v. Downes*, 18 Ves. 522; and per Lord Eldon C., with reference to the principal case, ib. 523, and the next note.

(2) Lord Eldon C., speaking with reference to this case, in *James v. Downes*, 18 Ves. 523, says, "but I apprehend the party cannot apply until default by the defendant; and then, he does not move for the injunction on the amended bill by reason merely of that default; but taking that as one ground, he moves for the injunction, verifying the truth of the amended bill by affidavit," &c. And again, shortly afterwards, "Until some default, the plaintiff cannot be entitled to the injunction; for instance, unless the time for answering has expired without an answer, no verification of the bill will do. If Lord Thurlow meant to lay down, that, although there was no default by the defendants, the mere verification of the amended bill was sufficient, with all deference, I do not agree to that."

(a) See note (a) in the next page.

(a) It is now however settled, upon great consideration, in opposition to this case, that if a plaintiff amends, after an injunction dissolved, upon the answer to the original bill, he cannot apply until the defendant is in default (not in contempt), for not answering the amended bill, and it is necessary for him to verify the truth of the amended bill by affidavit; the Court in the first instance giving credit to the bill if there is default; in the second instance not giving credit, unless besides the default the bill is also verified by affidavit. *James v. Downes*, 18 Ves. 522; *Bliss v. Boscawen*, 2 Ves. & Bea. 101; *Vipan v. Mortlock*, 2 Meriv. 476, et vide *Gad v. Worral*, 2 Anstr. 553. As to the doctrine of amendment in these cases, if the plaintiff, having obtained an injunction, amends the bill, the injunction is gone, unless sustained by the terms of the order, expressing that it is to be without prejudice to the injunction. It is always required that the case upon which an injunction is sought to be granted, should be put upon the record immediately; upon the principle that the party, the prosecution of whose demand is to be delayed by the injunction, shall be delayed as short a time as can be consistent with justice. The Court is therefore extremely jealous of allowing amendment without prejudice to the injunction; but it will occasionally even permit reamendment. In these cases the Court requires to know what the proposed amendments are; whether they are material, and if material, to have ascertained by clear and positive affidavit, that they relate to facts of which the plaintiff had no knowledge, which could enable him to bring those facts sooner upon the record. It is immaterial whence the plaintiff procures the information, whether from the answer or aliunde. *Bliss v. Boscawen*, cit. ante; *Mair v. Thellusson*, 3 Ves. & Bea. 145 n.; *Sharp v. Ashton*, ib. 144, et vide *Turner v. Bazeley*, 2 Ves. & Bea. 330. — *Eden*.

{ See 1 Smith Ch. Pr. (Am. edit.) 624 - 627; 2 Madd. Ch. Pr. (4th Am. edit.) 384; *Eden on Injunct.* (2d Am. edit.) 146, 148, et seq., and notes; 1 Barbour, Ch. Pr. B. 1, ch. 7, § 2, p. 223, 224. }

*PARKER v. APPLETON.

[*427]

Lincoln's-Inn-Hall, 19th, 20th Jan.

(No Entry.)

Where plaintiff has two demands on defendant, the one liquidated, the other matter of account, a writ of *ne exeat regno* shall be marked for the former demand only. (1)

MR. SOLICITOR-GENERAL, supported by Mr. Scase, moved for a *ne exeat regno*, on the following case.

The plaintiff's affidavit stated an agreement entered into in 1786, between him and the defendant, who was then in London, on behalf of himself and Benjamin Eyre, and also of Richard Smith, then residing in America, by which it was agreed, that they should be concerned together in an adventure of goods sent out to be sold at Boston, under the care of defendants, and in which they should be equally interested as to profit and loss; and that goods to the amount of 4647l. 11s. 4d. were shipped from Great Britain to Boston accordingly, and received there by the defendant Appleton:

That it was agreed between plaintiff and defendant Appleton, that he should (by his agent) sell the goods, and invest the proceeds in the American funds, which he (defendant Appleton) did, and purchased 34,000 dollars in the public debt of the American States, bearing an interest of 6 per cent. in his own name, or the name of his agent; and further stated that the present value of the said 34,000 dollars amounted, at the least, to 9000l. sterling.

The affidavit also stated that the plaintiff had advanced to defendant

(1) See *Sherman v. Sherman*, antea, 370, and the Editor's note referring to Mr. Beames's Treat. on Ne Ex. It will be seen there, that, although a demand be not actually liquidated, yet, if a precise balance can be sworn to, the writ will be granted and marked in that sum. The principal case, however, was not of that sort, as to the part unliquidated. Lord Eldon C., speaking of it, in *Cock v. Ravie*, 6 Ves. 284, says, "*Parker v. Appleton* seems to amount to no more, than that they were partners in a joint adventure; and it was part of the project, that, when sold, the produce should be invested in American stock. Then the defendant was trustee of one moiety for the plaintiff, and the writ was marked for that."

Appleton, the sum of 700*l.*, and that the defendant had paid on account thereof 302*l.* 5*s.* 6*d.* to plaintiff's use, leaving a balance due to plaintiff of 397*l.* 14*s.* 6*d.*, that the plaintiff's whole demand on defendant therefore amounted to 2647*l.* 14*s.* 6*d.*

It also stated, that plaintiff had acknowledgments and vouchers for only a small part of this demand, and could not proceed at law without a discovery from defendant; and that plaintiff had been informed, and believed that defendant intended to depart the kingdom, and go abroad out of the jurisdiction of this country to avoid discovery, and the account; and that in case defendant was permitted so to do, plaintiff would be in great danger of losing his debt.

[*428] *The plaintiff's solicitor swore, by his affidavit, to a conversation with Benjamin Parker, the confidential friend of defendant, wherein the latter said, that the defendant had informed him that he had taken an opinion on the subject of plaintiff's demand, and understanding that plaintiff would have a right to recover against him in a court of equity, he, the defendant, in order to avoid being sued in any court here, intended to quit the kingdom, and go and reside in Boston, in America, of which town he is a citizen, by which means he understood he should be enabled to avoid payment of said demand.

There was also a further affidavit, that Benjamin Parker, being applied to, to make an affidavit to these facts, declined so to do, on account of the intimacy subsisting between him and the defendant; and the deponent (plaintiff's solicitor) also swore, by his affidavit, that he had been informed the defendant concealed his place of residence, as letters, &c., were addressed to him at the Salopian Coffee House, within the verge of the Court, to which Coffee House he usually resorted.

Lord CHANCELLOR, at first, had difficulties about granting the writ; but upon it being mentioned the second day, and a full affidavit stated by Mr. *Solicitor-General*, he ordered the writ to issue, and to be marked for 2000*l.*, as the plaintiff's share of the moneys invested in the American funds, without taking notice of the matter of account subsisting between them. (a)

(a) See on this subject, *Sherman v. Sherman*, ante, 470, and notes to that case; *Atkinson v. Leonard*, ante, 223, 224, and notes; 1 *Barbour*, Ch. Pr. B. 3, ch. 6, § 2, p. 649, 650; 1 *Hoff*. Ch. Pr. ch. 2, § 8, p. 95, 96, and notes.

*HILARY TERM.

[*429]

32 Geo. 3. 1792.

ANDERSON and Others v. LEWIS.

LEWIS v. ANDERSON and Others.

(Reg. Lib. 1791. fol. 196. b.)

Practice. Where there are cause and cross-cause, and the plaintiffs in the original cause are many, several of whom are out of jurisdiction, others not to be found, and some peers of the realm, a motion that service on the clerk in court should be good service refused; (1) but plaintiffs shall not [pass publication] in the original cause, till they have answered the cross-bill. (2)

THESE were a cause and cross-cause relative to the Ayr Bank.

Mr. *Graham* moved, on the part of the defendant in the original, and the plaintiff in the cross-cause, that service of the *subpœna*, to appear and answer to the cross-bill of the plaintiff *Lewis*, on the clerk in Court for the plaintiffs in the original cause, might be deemed good service on the defendants in the cross-cause, who have not already appeared.

He stated as the reason for his motion, that the defendants in the cross-cause were very numerous [216], the transaction being a very extensive one; that many of them had become insolvent, and could not be found to be personally served; many of them were in Scotland out of the jurisdiction of this Court, and several of them were peers of the realm, to serve whom with his Lordship's letters and copies of the bill in the ordinary course, would be beyond the extent of any man's fortune; to obviate the objection that might be made, that it would be imposing a hardship upon the clerk in Court, he observed, that being all plaintiffs in the original bill, they must have employed one solicitor, who would of course employ but one clerk in Court, who must know the place of abode of all of them, and therefore could easily give them notice of the filing of the bill.

*He cited 1 Ch. Ca. 67 (*Love v. Baker*), where an action having [*430] been brought by defendants at Leghorn, a *subpœna* left with a party here, was ordered to be good service on parties abroad, and upon want of an answer, an injunction went: the defendants moved to dissolve the injunction: Lord Chancellor Clarendon advised with the Judges, and, on their opinion, dissolved the injunction; but this was against the opinion of the Bar; and in the Pract. Register, 342, it is laid down as the practice, that where the defendant has a bill pending here, or a suit at law against the complainant, and the now defendant is not to be found or heard of, or is beyond sea, the Court will, on motion, order service on another of the parties, the clerk in Court, or the attorney at law, to be good service.

LORD CHANCELLOR said, the effect of the motion would be, to compel an appearance of the party by a clerk in Court whom he had not appointed: that the case cited, was only of service for the purpose of an injunction-bill; that, in that case, service upon the attorney at law has been held good service, but in no other; (a) that in any other, making a man appear,

(1) See *Bond v. D. Newcastle*, ante, 386, and the Editor's notes; especially the reference to *Smith v. Hib. Mine Comp.*, 1 Scho. & Lefroy, 238, 239.

(2) The like order made also in *Gardiner v. Mason*, postea, 4 vol. 478.

(a) See 2 Madd. Ch. Pr. (4th Am. edit.) 198.

by appointing as clerk in Court for him, was what was never done; and therefore his Lordship refused the motion. (b)

Mr. *Graham* then moved, that the passing publication in the original cause, should be stayed until a fortnight after the plaintiffs should have put in their answers to the cross-bill.

This was opposed; but Lord CHANCELLOR said, that the plaintiffs in the original cause, who were defendants in the cross-cause, must appear gratis, and put in their answers in the second cause, before [they could pass publication] (3) in the first cause. (4)

(3) Correction in Mr. Brown's copy, and Reg. Lib.

(4) See also accordingly *Mason v. Gardiner*, postea, vol. iv. p. 478.

(b) 1 Smith, Ch. Pr. (Am. edit.) 461, and note.

[The cases upon this subject are contradictory; and in some instances considerable laxity has been permitted in service upon agents, &c., in consequence, probably, of some early decisions in Dickens. Thus, in *Hales v. Sutton*, 1 Dick. 26; *Carter v. De Brune*, ib. 39, service upon persons acting for defendant, under letters of attorney, have been held good service. In *Hide v. Forster*, ib. 102, and *Archdeacon Leslie v. ———*, cit. 1 Scho. & Lef. 238, service was allowed on an agent. In *Gardiner v. Mason*, post, vol. iv. 478, service in a cross-cause upon the clerk in Court, of the defendant, who was plaintiff in the original cause. In *Gildenichi v. Charnock*, 6 Ves. 171, service to clerk in Court to answer an amended bill, was held good service, but that was on the special circumstances, as, though he had not been served with a subpoena, he had appeared on two motions. But in *Roberts v. Worsley*, 2 Cox, 389, the plaintiff having amended after answer, and the defendant being then abroad, the Court would not allow service on the clerk in Court, to be good service. An application somewhat similar was also refused in *Bond v. the Duke of Newcastle*, ante, 386; and in *Smith v. the Hibernian Mine Company*, 1 Sch. & Lef. 238, Lord Redesdale expressly overruled two of the cases in Dickens, and therefore, except in the case of an injunction-bill (where service on the attorney of the plaintiff at law, has been held good service, for the cases upon which, vide *Burke v. Vickars*, ante, 24, and the Editor's note), and perhaps in that of an executor abroad, proving a will by a letter of attorney (1 Scho. & Lef. 239) the Court will not allow such substitution of service. — *Eden.*]

[*431] *JOHN BADRICK, JOHN GREENING, JOHN DELL, JOSEPH STEVENS, and JOHN COOPER, Plaintiffs.

CHARLOTTE STEVENS, ELIZABETH EVANS, and Farmer BULL, Defendants.

(No Entry.)

Testatrix gives legacies to be paid within three months out of a bond debt due to her; the obligor afterwards, in the lifetime of testatrix, paid the debt, and took up the bond; the legacies are thereby adeemed. (1)

JOYCE TAPPING, the testatrix, made her will, dated the 13th of May, 1784, which, *inter alia*, contained the following clause: "Also, I give and bequeath unto John Badrick, of Burton, in the county of Bucks, laborer, and John Greening, of Marsworth, in the said county of Bucks, yeoman, who formerly lived with me as servants, the sum of 30*l.* each, to be severally paid to them within three months next after my decease, out of two

(1) See the judgment from Sir J. Simeon's MS. note, postea (next page), and S. P. Stanley v. Potter, 2 Cox, Ca. Ch. 180. See the case of *Ashburner v. McGuire*, antea, 2 vol. 108, with the Editor's notes. Although the Lord Chancellor's reasons, in the principal case, are not stated in Mr. Brown's report, this case was clearly one of a specific legacy upon the face of the will, for the reasons (*inter alia*) assigned by Mr. Roper, 1 vol. Tr. on Legacies, 17; viz. that the Court was satisfied, that the testator, by giving aliquot sums out of a particular debt, which constituted in the whole the precise amount of that debt, meant to give that debt and nothing else. The Editor has, rather fortunately, been favored with Sir J. Simeon's MS. note of Lord Thurlow's judgment in the principal case, which was certainly a *desideratum*; and it is inserted at the end of the case.

hundred pounds due from John Cooper (thereby meaning the plaintiff John Cooper) to me on bond. Also, I give and bequeath unto John Dell, of Leighton Buzzard, in the county of Bedford, butcher, and Joseph Stevens, of Leighton Buzzard, aforesaid, glover, the sum of fifty pounds each, to be severally paid to them within three months next after my decease, out of the said sum of two hundred pounds due to me from said John Cooper. Also, I give and bequeath unto the said John Cooper, the sum of forty pounds, being the remainder of the said sum of two hundred pounds due from him to me as aforesaid. The testatrix, after bequeathing several other pecuniary legacies to be paid out of her personal estate, within the same period of three months next after her decease, gave and bequeathed all the rest and residue of her money, chattels, rights, credits, and personal estate whatsoever and wheresoever, from and after payment of her debts, legacies, and funeral expenses, unto her half-sister, Charlotte Stevens, and her daughter Elizabeth Evans, to be equally divided between them, share and share alike; and she appointed the defendants executrixes and executor of her will, who proved the same, and possessed assets.

About the 10th of August, 1786, in the lifetime of the testatrix, John Cooper paid the debt with interest, and took up his bond; but whether voluntarily, or upon demand, did not appear. [See, however, 1 Roper on Legacies, 30, 31.]

*The question was, whether the payment adeemed these legacies. [*432]

Mr. Cooke, for the plaintiff, argued that this is neither a bequest of the debt, nor part of the debt, but it is demonstrative within the notion of the civilians; that is a legacy, in its nature a general legacy, but where a particular fund is pointed out to satisfy it, as in Pawlett's case, where there was a bequest of 500*l.*, which my sister now has in her hands, of mine, the legacy was held due, although the debt was paid testatrix ten years before her death. So *Theobald v. Wynn*, and *Squib v. Chichely*, cited in Pawlett's case, Sir Thomas Raymond, 335. Again, in *Ford v. Fleming*, 2 P. W. 469, A. gave her grand-daughter 40*l.* out of a debt due to the testatrix from J. S. for rent, she allowing her part of the charge of recovering the same. Lord Chancellor King held that the testatrix, receiving in the debt herself, though upon her suing for it, was no ademption of the legacy. This decision must have proceeded upon the ground of its being a general legacy, notwithstanding a fund was mentioned out of which it was to be paid; for, if it had been a specific legacy, it is clear, from all the cases, that the testatrix having called in the debt, it would have been adeemed. *Attorney-General v. Parkyn*, Amb. 566, and *Cartwright v. Cartwright* (cited ante, v. ii. p. 114), (2) are in favor of the plaintiff's claim; and *Savile v. Blacket*, 1 P. W. 777, is expressly in point.

(2) There is a full report of this case in Dr. Wooddeson's 3d vol. System. View of the Law, App. viii.

"But Lord Thurlow C. stopped Mr. Cooke, and said he agreed to the decision in Blacket's case; the power, there, being but subservient to the raising of the legacy, which was a general legacy charged upon a special fund.

"But that the common and known distinction was between a *legatum debiti vel nominis*, which is specific, and a general pecuniary legacy charged upon a particular fund, which is but making a more anxious provision for payment, and does not alter the nature of the legacy. (a) But that nothing could be more specific than giving part of a debt, and no difference between that and giving part of the produce of a jewel or a horse, in all which cases, though it had preference in case of abatement, it must take its chance of being lost by destruction of the thing out of which it was to arise. And that discharge of the debt is not strictly an ademption in such case, which depends upon the intention to adeem, but is an extinguishment of the legacy by annihilation of the subject liable. (a)

"And therefore dismissed the bill."

(a) See note (a) on next page.

From Sir J. Simeon's MSS.

There Sir Edward Blacket, by his will, gave to his two daughters 2000*l.* a piece, to be paid in the manner therein mentioned; that is, 500*l.*, part thereof, he directed to be charged upon, and raised out of, premises comprised in his marriage settlement; and on which lands he declared, by his said will, he had power to charge 1000*l.* Sir Edward Blacket had joined with his son in the recovery of these premises, and had thereby (according to the opinion of the Court, on a question raised in the cause) extinguished his power to charge. And Lord Macclesfield, upon the hearing, for further directions, notwithstanding these sums had been charged on a fund which failed, decreed them to be paid out of the father's personal estate, which is the same as if he had declared the two sums of 500*l.* to be general legacies. These authorities, Mr. Cooke insisted, were sufficient to prove the plaintiff's claim well founded.

But the Court (2) dismissed the bill without costs.

(2) See note (2) in the preceding page.

(a) See Bishop of Peterborough v. Mortlock, 1 Bro. C. C. 565, 566, note (a), and cases cited; Walton v. Walton, 7 John. Ch. 253; White v. Winchester, 6 Pick. 48; Bradford v. Haynes, 20 Maine, 105; Simmons v. Vallance, 4 Bro. C. C. 345; Stafford v. Horton, 1 Bro. C. C. 483, and note (a); Ashburner v. Macguire, 2 Bro. C. C. 108, 112, note (a), and the cases there collected and cited; Moore v. Moore, 1 Bro. C. C. 127; Land v. Devsnyes, 4 Bro. C. C. 537; Roberts v. Pocock, 4 Ves. 153.

If, after devising a mortgage, the testator foreclose or take a release of the equity of redemption, or an absolute deed, it is a revocation of the devise. Ballard v. Carter, 5 Pick. 112. Sale of part of a certain number of shares bequeathed is an ademption *pro tanto*. White v. Winchester, 6 Pick. 48. See also Hawes v. Humphrey, 9 Pick. 350. A change of the testator's interest by operation of law is not an ademption. Walton v. Walton, 7 John. Ch. 265.

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*FRANKLIN v. FRITH and Others.

(Reg. Lib. 1791. A. fol. 139.)

Executor keeping money of testator's in his hands, liable to interest and costs. (1) Lord Chancellor said, if he laid it out in the three per cents. the Court would affirm his act. (2)

THE testator died in 1781, having appointed defendants his executors, and having, by his will, directed payment of debts out of the funds in their hands at interest. In 1782 a demand was made upon them, by John Franklin, of 420*l.* This demand being withstood by the executors, it was agreed to refer the matters in dispute to Mr. Hill, and arbitration-bonds were entered into, but he not being able to form a judgment upon them, the action which had been brought was tried, and the plaintiff, in 1786, obtained a verdict for 290*l.* In the following term the executors moved for, and obtained a new trial, but neither party proceeded upon the order. In 1781, a suit had been instituted in the court of chancery, charging that 500*l.*, part of the fund, was trust-money, belonging to the

(1) See also Newton v. Bennet; Parkins v. Bayntun, and Treeves v. Townshend, ante, 1 vol. 359, 375, & 334; likewise Littlehales v. Gascoyne, ante, 73, with the Editor's notes on each of the cases. Tebbes v. Carpenter, 1 Madd. Rep. 290, &c.

(2) The Court will affirm what it would order to be done; and as "the fund of the 3 per cents. is the fund of the Court," the Court not only protects an executor in an investment therein of the outstanding property, but holds it to be his duty so to invest it, and even to transfer a testator's general stock in other funds into that. Vide Howe v. E. Dartmouth, 7 Ves. 137, et seq., 150, &c. That rule, however, seems not to apply (or at least, not with propriety) to cases where the parties beneficially interested all reside abroad, and the funds are there invested. Holland v. Hughes, 16 Ves. 111. It is not an executor's duty to call in money due on a mortgage without danger of risk. 7 Ves. 150.

plaintiffs in such suit. The executors put in their answer immediately, and a decree was made in 1783, referring the matters of the suit to arbitration. In 1786 that bill was dismissed. In 1787 costs were taxed, and paid in 1788. In January, 1788, the present bill was filed by legatees, and the executors put in their answer immediately, stating that they had always been ready to pay the legacies, if they could have done the same without risk, the plaintiff in the action, and the plaintiffs in the bill, threatening to revive their demands; and that the defendant Burnham had offered to pay the legatees their legacies, if a Mr. Smith, who accompanied them to demand payment, would indemnify them.

The cause coming on, it was referred to the Master, to inquire what balances had been in the hands of the executors, and upon what pretences the same had been retained. The Master reported the above, and that the defendant Burnham had always kept at his banker's sufficient to repay the balance in his hands, which was about 400*l*.

Mr. *Solicitor-General* and Mr. *Fonblanque*, for the executors, abandoned the point of interest, but contended, with respect to costs, that the executors ought not to be subjected to them, and for this purpose cited *Newton v. Bennet* (ante, vol. i. p. 359), where the Court would not charge the executor with the costs of taking the account, and where, though he had caused *delay, the Court liquidated that by [*434] not giving him his costs; and *Parrot v. Treby*, Pre. Ch. 254, where it is said, that upon a bill to call a trustee to an account, if he, by answer, submit readily to it, though, on the answer, he be found in debt, yet he shall pay interest for the balance only, from the time of the account liquidated, and no costs.

Lord CHANCELLOR said, he never could permit an executor to keep 400*l*. of his testator's money dead in his hands, (a) and that the keeping an equal sum at his banker's was no proof that he did not make interest of it: with respect to costs, it must depend on the conduct of the executors; if kept to answer the exigencies of the testator's affairs, it would be an excuse for not paying it over; but outstanding demands, even on probable grounds, are no reason why the executors should not lay their testator's money out. (b) If they had laid it out in 3 per cents., the Court would have affirmed their act; but from the time the cause was at an end, there was no excuse, there was no pretence, that that action had any ground at all, it might therefore have been non-prossed; and as to the other suit, that was dismissed in 1787, so that, when this bill was brought, they had kept the money in their hands, without a cause, full four years; therefore they must pay the interest and costs. (c)

The *Solicitor-General* mentioned, that, in a case *Ex parte Champion*, Lord Kenyon held, that an executor laying out his testator's money in 3 per cents. was not liable to the fall stocks. Lord Chancellor seemed to think there had been many such decisions, but Mr. *Solicitor-General* observed, that a case before Lord Northington, mentioned by Lord Kenyon,

(a) See notes to *Newton v. Bennet*, 1 Bro. C. C. 359, 361, 362; *Treves v. Townshend*, 1 Bro. C. C. 384; *Perkins v. Baynton*, 1 Bro. C. C. 375, and note; *Lomax v. Pendleton*, 3 Call, 538; *Miller v. Beverley*, 4 Hen. & Munf. 416.

(b) See, upon the duty of executors and trustees not to allow trust-money to lie idle, *Browne v. Southouse*, 3 Bro. C. C. 107, 108, and notes; *Littlehales v. Gascoyne*, ib. 73, 74; *Newton v. Bennet*, 1 Bro. C. C. 361, and notes; 2 Williams, Ex. Pt. 4, B. 2, ch. 2, § 2, p. 1132, 1133; *Ram on Assets*, ch. 38, § 5, p. 512, et seq.

(c) See *Treves v. Townshend*, 1 Bro. C. C. 384, note (1).

in *Ex parte Champion*, was the only one that was even now known to the profession. (3)

(3) See one in 1774, before Lord Bathurst, *Hancom v. Allen*, 2 Dick. 498, et vide *Pente v. Crane*, *ibid.* 499, note, before Lord Thurlow.

HUGHES v. HUGHES. [Jan. 31.]

(Reg. Lib. 1791. A. fol. 215.)

Where the period of division is marked out by the testator, only children *in esse* at that period can take; but where the gift is general all the children shall take. (1)

IN the report of this case (*ante*, p. 352), it is by mistake represented as finally determined; but it since appears Lord Chancellor, at [*435] that time, only threw out his general sentiments *upon it. The cause stood for judgment on the 31st January, when Lord Chancellor expressed himself to the following purport:—

LORD CHANCELLOR. When a testator gives all his property to be divided among his children, when they shall attain twenty-one, in so general a manner, the principle of the cases seems to have been, that such a general devise shall embrace all the children, and the distribution must be accordingly made among all: but where the Court has ascertained the time as perfectly marked out by the intention of the testator, it is considered as the period of vesting the property in possession, and consequently when it comes to be distributed, it must be among those only who are *in esse* at that time. Here, however, a fortune is given generally to all the children, and there seems to be no expression, which, either naturally or impliedly, can exclude any of the children from their distributory share: this being a general gift, not narrowed or controlled by any words the testator has used; consequently, the youngest child must take at twenty-one, with the rest. (2) (a)

(1) This is the true rule, with its proper limitations. See the Editor's notes to this case, *ante*, 352, and to *Andrews v. Partington*, *ante*, 401. See, in particular, *Attorney-General & Crispin v. Congreve v. Congreve*, and *Gilmore v. Severn*, *ante*, 1 vol. 386, 536, & 582; *Maddison v. Andrew*, 1 Ves. 60, and *R. L.* 1747, B. fol. 119; and *Buffar v. Bradford*, before Lord Hardwicke C.

Lord Redesdale's MS. note is as follows: "Per Lord Hardwicke C. Where personal estate is given to A., and his children after the death of B., the after-born children of A. shall take; for it is a future devise in the nature of it. Again, if a personal devise was made to A. and his child, who, at the time of the will, had none, those after-born, in life of testator, shall take; for it will be presumed the testator knew his devisee had no children when he made his will."

(2) "And as to the clear residue, &c. his Lordship doth declare, that the same will be divisible between all the grandchildren of the testator that were living at the time of his decease, and that have been born since, and that shall be born, until the youngest of such children shall attain the age of twenty-one years." *R. L.* et vide *Lord Eldon C.'s* variation of this decree on a rehearing (14 Ves. 246, &c.), stated *ante*, 351 - 355, note.

(a) See the cases collected in note (a), to *Andrews v. Partington*, *ante*, 404.

LINGARD and Others v. WEGG and Others.

(No Entry.)

[A plaintiff having become bankrupt, and his assignees not having the consent of the creditors to proceed in the cause in due time, the defendants obtained an order to dismiss the bill for want of prosecution. This order discharged under the circumstances, upon the terms of the assignees filing a bill of revivor within a week.] [Whether bankruptcy is an absolute abatement of the suit, *quære*.] (1)

MR. GRAHAM moved, that an order of the 6th August, 1791, that the plaintiff's bill should stand dismissed, with costs, might be set aside, on the following circumstances:

Lingard, with Hesler, brought the original bill for an account of moneys in the hands of Wegg, the defendant: afterwards a negotiation was entered into by the parties for adjusting the matters in question, which being unsuccessful, an attachment was issued for want of an answer, on the 11th November, which being served, the defendant put in an answer. After this, it became necessary to file an amended bill.

On the 7th May, 1791, a commission of bankruptcy issued against the plaintiff, Lingard, and the assignees not being able to get the consent of the creditors to proceed in the cause till November, the plaintiffs were then first informed, that during the sittings after Trinity term, the bill had been dismissed with *costs, and the plaintiff's solicitor [*436] swore that this had been moved without notice.

LORD CHANCELLOR thought, that the bankruptcy amounted to an abatement of the suit, but, on the circumstances of the case, set aside the order of dismissal, on the plaintiff's undertaking to file a bill of revivor in a week. (a)

(1) It appears, that there is not only a contradiction between the practice of the two courts of equity on this subject, but that the doctrine of the Court of Chancery in particular has much fluctuated, and is even yet unsettled. Lord Thurlow seems, from the above report, to think the bankruptcy an actual abatement, and, of course, that a bill of revivor was requisite; but it appears that, in *French v. Barton*, 18 Ves. 425, note, his Lordship had previously thought it merely matter for a supplement bill. The whole subject is so well laid before the profession by Mr. Beames, in his *Elem. Pleas*, from p. 286-292, that it would be superfluous to enter into the discussion in this place, farther than to observe, that Lord Redesdale is there thought to consider bankruptcy as no abatement, although a suit must evidently be as defective as if it were abated; and the doctrine, even thus treated, is surrounded with much embarrassment. See *Beam. El. Pl.* 291. It may be sufficient for the Editor to add, that the practice, as now understood, seems to coincide with the view last mentioned as taken by Lord Redesdale, and to refer to the recent case of *Randall v. Mumford*, 18 Ves. 424, which gives a full view of the subject, although it did not decide the point.

(a) The suit in such case should be continued by an original bill in the nature of a supplemental bill. 3 Dan. 201; 1 Barbour, Ch. Pr. B. 4, ch. 1, § 1, p. 36. See 1 Smith, Ch. Pr. (Am. edit.) 514, 516.

Ex parte CHAMPION, in the Matter of MILLS and SWANSTON, Bankrupts.

There being a surplus of a bankrupt's estate, interest allowed to creditors, where, by the course of actual trading between the parties and settled accounts, interest was allowed after a certain credit. (1) [Accounts made up and delivered from time to time upon that footing, held good evidence of a contract for the purpose. No allegation or proof of any general custom of trade, however, could have had that effect, nor anything short of actual evidence of contract between the parties.]

A PETITION by the executor of John Platt, wholesale linen-draper, deceased, who carried on business in partnership with John Platt the younger, and with John Turner deceased, in behalf of himself and other creditors of the like description, of Mills and Swanston, bankrupts.

And the prayer of the petition was, that Lord Chancellor would order the commissioners named in the commission, to compute interest from the date of the commission upon the debt proved by the petitioner's testator under the same, and upon debts of other creditors under the like circumstances, at such rates of interest as were originally allowed by the bankrupts in their accounts with their several creditors; and that the assignees might be directed to pay the same to the plaintiff and other creditors.

For this purpose, the petition stated, that it had been, for many years, established as a custom in the city of London, that in cases where merchants purchase goods at credit to send abroad, and do not pay for the same when they become due, to allow the tradesman of whom they purchased, interest, at the rate of 5*l.* per cent. per annum, for extra credit to the time of payment; and at some given period of the year, the parties so dealing settle a balance, in which is included interest for the extra credit, and the balance so settled is carried to the next account:

That it is also a custom for merchants who purchase goods, and [*437] sell the same abroad upon credit, to make up and adjust *their accounts annually with their foreign correspondents, to charge them with interest at different rates, from five to six and seven per cent. for extra credit upon goods sold, as well as for interest of money advanced, and to carry on the balances so formed from year to year:

The petition then stated, that the accounts were made up at the ends of several years, and settled in such manner between the petitioner's testator and his partners, and the bankrupts; and that such yearly accounts were checked, examined, and agreed to by the bankrupts; and one instance in which the bankrupts paid to the petitioner's testator and his partners a sum of 1297*l.* 14*s.*, which included interest so settled, and that subsequent accounts were settled in the same manner, down to the determination of the partnership between the petitioner's testator, and his partners, when there was a balance of 2225*l.* 7*s.* 11*d.* due to them from the bankrupts. The petition then stated the commission issued 29th January, 1781, and

(1) See other orders in the same bankruptcy upon the like principle, *Ex parte* Morris, *antea*, 79; *Ex parte* Hankey, *postea*, 604, which was affirmed by Lord Loughborough C., 2 Ves. jun. 295, *sub nomine*, *Ex parte* Mills. As to the doctrine of implied contracts for the allowance of interest, see *Morgan v. Mather*, 2 Ves. jun. 15, &c., and 2 Christ. B. L. 281, and the above-cited cases. It must be observed, that such advantage is confined strictly within the circumstance of a contract, either expressly or clearly implied, and evidenced in point of fact. For defect of this, Lord Eldon C. held decidedly, in *Ex parte* Koch, 1 Ves. & Beames, 342, that no interest was payable under a bankruptcy, upon an undertaking to pay money at a day certain, or on demand, although there was a surplus. See his Lordship's reasoning there.

that petitioner's testator proved the said debt under the commission, and received dividends on the same to the amount of 20s. in the pound :

That after payment of the same, there remains a very large surplus in the hands of the surviving assignees, arising from the bankrupt's effects, to the amount of 50,000*l.*, which surplus the petition stated, to have in a great measure arisen from the circumstance of the interest upon the debts due from the bankrupts, to such of the creditors whose debts bore interest, ceasing from the issuing of the commission; and the interest upon debts due to the bankrupt's estate from their correspondents, and particularly those in the West Indies, continuing to run at a very high rate of interest to the time of payment :

That on the 20th of April, 1790, a petition was presented by Eleanor Morris, and other creditors of the bankrupt whose debts bore interest, praying that interest might be paid to them from the date of the commission; upon which it had been referred to the commissioners to compute interest on those debts, and that the assignees should pay the same; and that the commissioners had held meetings to carry the same into execution: at one of which meetings, the petitioner's solicitor had attended, and requested, that the commissioners would compute interest on the debts due to the petitioner's testator, and a calculation of the interest *due to the amount of 616*l.* 0*s.* 1*d.* was produced to the [*438] commissioners, but they refused to admit the claim, alleging that they thought, under the order, they were at liberty to allow interest only on such debts as bore interest on the face of the securities held by the bankrupt's creditors, not on debts like that of the petitioner's testator and his partners.

The present petition was therefore presented, praying, as before stated, and alleging, that the said debts, after the repeated yearly settlements between the creditors and the bankrupt, is a debt carrying interest on the face of it, and that, under the circumstances, it is a legal as well as equitable debt.

The custom of merchants, as stated, and also the fact as to the yearly settlements of accounts, were verified by affidavit.

Mr. *Solicitor-General*, and Mr. *Mitford*, against the petition.

The order already obtained is the same as was made by Lord Hardwicke, in the case of Sir Stephen Evance, (2) *Bromley v. Goodere*, 1 Atk. 75. (2) Lord Hardwicke there laid down, that where interest is given by way of damages, it cannot be computed in bankruptcy; he therefore confined his order to bonds and notes carrying interest, (3) and the relief given was, that the bonds should carry interest, but not to exceed the penalties, but that notes carrying interest should have interest computed on them to the full amount that was due; but he did not give any interest on notes payable on demand, though they would carry interest at law in the form of damages. The same doctrine is laid down in the case *Ex parte Malar*, 1 Atk. 150. In *Ex parte Rooke*, 1 Atk. 244, the bankrupt was bound, by his own offer, to pay what the Master should report to be due. There is nothing here to bring this debt within the order. The petition states the circumstances of the trading and making up the accounts. If they had been entitled, by the form of the contract, to interest, they would have made the demand of it when they first came

(2) The terms of the order made in this matter serve now as a precedent, and are invariably followed. See per Lord Eldon C., in *Ex parte Koch* (cited in note (1) ante), 1 Ves. & Beames, 346.

(3) "To such debts as by the contract convey interest." See 1 Ves. & Beames, 346.

to demand a dividend under the bankruptcy; but they did not pretend to do that, they proved their debt as a simple contract debt, without any charge for interest.

They now put it upon a custom in this particular trade, but they are not, in any view, entitled to interest.

[*439] *It is no objection that this demand is new, but if it is not reasonable, that is material.

If they had brought an action and succeeded, the question would be, whether they were entitled to interest. If they had been held to be so, it must be by way of damages for the detention; and wherever interest is given, at law, by way of damages, it cannot be computed in bankruptcy.

There has been no case of such demand against a surplus, where interest was not reserved by the form of the written contract.

LORD CHANCELLOR. (4) I agree with Lord Hardwicke's rule, that where a contract is entered into for a certain sum, and interest could not be given at law but in the shape of damages, it is not the course of the Court to give interest in bankruptcy.

That reduces it to this question, whether there was an original contract, that, after the fourteen months' credit, the debt should bear interest.

If the agreement had been put into writing without a specialty, that there should be credit given for fourteen months, and if any sums should be in arrear, interest should be paid, one could not doubt but the debt must bear interest.

I take it to be clear, that, in all the cases, the question has arisen on the original contract.

The contract for interest has been at five per cent., but the contract is not proved by writing, or conversation between the parties.

It is proved by two *media*; by the custom, and the settlement; that the custom is so general, that the parties must have known of it. (a)

(4) The Editor also subjoins Sir J. Simeon's note of this judgment:—

"The Lord Chancellor acknowledged the rule to be as laid down by the Solicitor-General, but that it did not apply to those cases where, by express or implied contract, interest was to be given, being to be considered as part of the debt. And that whether the contract was in writing, as on a promissory note with interest, or by parol, made no difference; and that where there has been a course of dealing, as here, by which interest was always charged and allowed from a certain period, that was evidence of a contract, *a priori*, to pay interest, not on the ground of any custom or usage of trade, which he thought could not in such cases alter the law of the land, which allowed no interest on simple contract, but merely as evidence of agreement in the particular case. Upon the same ground, he thought interest upon interest had been reprobated, without reason, where the contract was to pay it, for there was no more reason that a man should detain the interest due beyond the time of payment than the principal, to the prejudice of the creditor; though it was too firmly established to shake the decisions on this head. (†) He expressly desired to be understood, that he did not mean to shake the common rule, and that he only meant to give interest as an exception in cases of actual contract, expressed or implied. There being an interval between the last payment of interest and the bankruptcy to which the petition did not extend, his Lordship said, that interest might have been calculated and proved as part of the debt under the commission; and that if the petitioner had prayed it, he should have given interest from the last payment, and not merely from the bankruptcy."

(†) Vide *Sackett v. Bassett*, 4 Madd. 58, and *Mr. Maddock's note*, 64.

(a) An agreement between the parties that interest should be paid, may be inferred from the course of dealing between them; as, if it has been frequently charged and paid without objection, in former and similar accounts. *Calton v. Bragg*, 15 East, 223; *Bruce v. Hunter*, 3 Camp. 467; *Gwyn v. Godby*, 4 Taunt. 396; *Eaton v. Bell*, 5 B. & Ald. 34.

The invariable and universal custom or usage in any particular trade or business to charge interest, may also evidence and establish a contract to allow it between parties having transactions therein. *Chitty, Cont.* (5th Am. ed.) 647, and cases cited to this point. See also on this head, *Read v. McAllister*, 8 Wend. 109; *Wood v. Hickok*, 2 Wend. 501; *Reid v. Rens. Glass Factory*, 3 Cowen, 436; *Barclay v. Kennedy*, 3 Wash. C. C. 360; *Denniston v. Imbric*, 4 Wash. C. C. 396.

I acknowledge there is some difficulty when considered merely on that ground; but it appears that, upon settling the accounts, they have allowed it, and this must proceed on their knowledge that it was right.

*If it is agreed that there was no title to interest *a priori*, yet [*440] the party receiving the account so made up, is evidence of an agreement. (5)

Therefore, if the question had been only as to the fact of this practice continuing to the bankruptcy, I should think the interest was due *ratione contractus*, but I do not rely so much on the custom, as upon the settling the accounts.

So in the case of interest upon interest, though in other cases the Court will not allow of it, yet where there are regular accounts settled from time to time, interest on interest is allowed.

That is admitted in all cases but that of a mortgage; and that exception only stands on authority. (†) I see no reason why interest on interest should not be allowed in that case, but that it is inconsistent with the rule of jurisdiction; but in merchants' accounts it is always admitted, on the ground of an original contract, and the settling accounts in that way is evidence of an original contract. (b)

Therefore, they would have been entitled to have proved the interest originally; not having done so, would afford some evidence that it was not the original contract; but that is repellable by the stronger evidence of its being so, and that circumstance is not strong enough to cut down their original contract.

Therefore, I go on the ground of an original contract that, after fourteen months, the goods should be paid for with interest, and I do not infringe upon the rule, that the Court does not give interest in bankruptcy, where it would be taken at law as damages.

The custom, I consider as evidence of an original contract; it may be, that forty out of eighty may not have claimed it. Where it is to depend on the custom, the only difficulty is to establish what the custom is.

In leases, where there is a written contract, it is not unusual to produce proof of custom with respect to the mode of husbandry; much more here, where the agreement was by parol.

His Lordship therefore made the order as prayed.

(5) See *Tickel v. Short*, 2 Ves. 239; *Willis v. Jernegan*, 2 Atk. 252, &c.

(†) See note (†) in the preceding page.

(b) Compound interest is allowed, if the claim be supported by the known usage or custom of trade, or the particular course of dealing between the parties. *Calliot v. Walker*, 2 Anst. 496; *Eaton v. Bell*, 5 B. & Ald. 34; *Newal v. Jones*, Moo. & M. 449; *Chitty*, Cont. (5th Am. ed.) 647. But see *Marr v. Southwick*, 2 Porter, 351.

Compound interest is not illegal, and may be recovered on an express promise, or on one implied by law as part of the contract. *Bainbridge v. Wilcocks*, 1 Baldwin, 538. But see *Mowry v. Bishop*, 5 Paige, 98; *Camp v. Bates*, 11 Conn. 487; *Connecticut v. Jackson*, 1 John. Ch. 14; *Rodes v. Blythe*, 2 B. Monroe, 336; *Van Benschooten v. Lawson*, 6 Johns. Ch. 313.

An agreement to pay interest on interest, which has already become due, is not usurious. *Mowry v. Bishop*, 5 Paige, 98; *Camp v. Bates*, 11 Conn. 487; *Harvey v. Crawford*, 2 Blackf. 43; *Fobes v. Canfield*, 3 Ham. 18; *Kellogg v. Hickok*, 1 Wend. 221; *Rodes v. Blythe*, 2 B. Monroe, 336. The taking of compound interest is not usury. *Otis v. Lindsay*, 1 Fairf. 315. See *Childers v. Deane*, 4 Rand. 406.

If compound interest is voluntarily paid by the debtor, it cannot be recovered back. *Mowry v. Bishop*, 5 Paige, 98; *Camp v. Bates*, 11 Conn. 487.

A note made payable with interest annually does not entitle the holder to compound interest. *Doe v. Warren*, 7 Greenl. 48; *Hastings v. Wiswall*, 8 Mass. 455. But see *Greenleaf v. Kellogg*, 2 Mass. 568; *Watkinson v. Root*, 4 Ham. 373.

[*441] *The ATTORNEY-GENERAL v. PARNTHER and Others. (1)

[S. C. 2 Dick. 738, upon a former occasion.] (2)

(Reg. Lib. 1791. A. fol. 117. b.)

General principles on cases of insanity.

THE information stated, that by a decree at the Rolls, made on the 10th day of May, 1780, by the late Sir Thomas Sewell, it was (inter alia) ordered, that 5000*l.* bank stock, 4000*l.* 4 per cent. consol. annuities, 3000*l.* 3 per cent. consol. bank annuities, 3000*l.* old South Sea annuities, 4000*l.* reduced 3 per cent. annuities, and 1000*l.* lottery annuities, the interest of which was given to Frances Barker, then a feme covert (by the will of her father William Loney, deceased), for her life, for her separate use, should be transferred to the Accountant-General, and the interest thereof should be paid to the said Frances Barker, during her life, for her separate use, and, on her death, all parties interested were to be at liberty to apply.

Frances Barker, by a power of attorney, duly executed by her, dated 14th December, 1780, authorized and empowered John Barker, her late husband, to receive the dividends then due, or which should become due, on these funds.

The bill further stated, that before, and on the said 14th day of December, 1780, the said Frances Barker was of unsound mind, and had ever since continued so, and was kept in confinement, and treated as such. That John Barker the husband, by virtue of the letter of attorney, received the dividends; that he was since dead, having made his will, and appointed the defendants his executors. That, in the month of February, a commission of lunacy had issued to commissioners, to inquire as to the lunacy of Frances Barker, and upon the inquisition it was found that she was a lunatic, and that she did not enjoy lucid intervals, and had been in that state from the 17th day of December, 1783; and that the defendants, Alexander Aubert, Arnold Mello, and Dorothy Olympia, and Henrietta Aubert, had been appointed committees of her person and estate.

The prayer was, for an account of the dividends received by the late husband, by virtue of such letter of attorney.

The defendants, by their answer, admitted, that they knew that the said Frances Barker had been occasionally, before the *execu- [*442] tion of the power of attorney, disordered in her mind; but that she appeared to the defendants Aubert and Mello, who are the subscribing witnesses thereto, at the time of the execution thereof, to have the use and enjoyment of her senses, and mental faculties, sufficiently strong to fully understand and comprehend the nature of the acts she then did; and that before she executed it, they explained the nature and effect of it, and that it was authorizing her husband to receive the dividends, and expressly asked her if she did it with her own free will and consent, which she readily answered she did, and then executed the letter of attorney.

The cause coming on to be heard before Lord CHANCELLOR, on the 27th July, 1791, his Lordship ordered the parties to proceed to a trial at law on the issue, "Whether Frances Barker was a lunatic at the time she

(1) This report is from the notes of Mr. Fonblanque, but copied rather inaccurately. *Ex informatione.*

(2) It was, at first, doubted, in this case, whether such a bill would lie, by the Attorney-General, on behalf of a lunatic. *Vide* 2 Dick. 748.

executed the letter of attorney, and that the jury should indorse on the postea, at what time she became so."

The cause came on to be tried before Lord *Kenyon*, and a full special jury, on the 14th December, when a great deal of evidence was given in support of the plaintiff's case, by the persons who attended on Mrs. Barker, to prove general derangement, though with intervals of sense. On the part of the defendants, several witnesses were called, particularly Mr. Aubert and Mr. Mello, the subscribing witnesses, who spoke to her being perfectly sound and competent at the time of the execution of the instrument; and the other witnesses, who were persons in the habits of intimacy with her, spoke to her having frequent intervals in which she was perfectly competent to doing any rational act.

The jury, without any hesitation, found a verdict for the defendants, and declined making any indorsement on the record but the general verdict.

This verdict being dissatisfactory to the plaintiffs, they applied, 6th February, 1792, to the Lord Chancellor for a new trial, who read Lord *Kenyon*'s report, in which he disapproved of the verdict. The application was supported by Mr. *Attorney-General*, Mr. *Selwyn*, and Mr. *Steele*, and was opposed by Mr. *Solicitor-General*, Mr. *Mansfield*, Mr. *Erskine*, and Mr. *Hollist*. The argument *turned principally on the [*443] special circumstances of the case, and, therefore, though demonstrative of the most splendid abilities, is not here reported; but Lord Chancellor's judgment lays down such general, though not universal, rules on the subject as may be highly useful in their application to particular cases.

LORD CHANCELLOR. There is an infinite, nay, almost an insurmountable, difficulty, in laying down abstract propositions upon a subject which depends upon such a variety of circumstances as the present must necessarily do. General rules are easily framed; but the application of them creates considerable difficulty in all cases in which the rule is not sufficiently comprehensive to meet each circumstance, which may enter into, and materially affect, the particular case. There can be no difficulty in saying, that if a mind be possessed of itself, and that at the period of time such mind acted, that it ought to act efficiently. But this rule goes very little way towards that point which is necessary to the present subject; for though it be true, that a mind, in such possession of itself, ought, when acting, to act efficiently, yet it is extremely difficult to lay down, with tolerable precision, the rules by which such state of mind can be tried. The course of procedure, for the purpose of trying the state of any party's mind, allows of rules. If derangement be alleged, it is clearly incumbent on the party alleging it, to prove such derangement: if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers; (3) and it certainly is of equal importance, that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement. (4) The

(3) See in *Cartwright v. Same*, 1 Phill. Rep. 100, in *Hall v. Warren*, 9 Ves. 611, and in *White v. Wilson*, 13 Ves. 88.

(4) Lord Eldon C., observed, that Lord Thurlow in this case placed the position much
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evidence, in such a case, applying to stated intervals, ought to go to the state and habit of the person, and not to the accidental interview of any individual, or to the degree of self-possession in any particular act; for from an act with reference to certain circumstances, and which does not, of itself, mark the restriction of that mind which is deemed necessary, in general, to the disposition and management of affairs, it were [*444] *certainly extremely dangerous to draw a conclusion so general, as, that the party, who had confessedly before labored under a mental derangement, was capable of doing acts binding on himself and others. (5)

The argument urged by the *Solicitor-General*, that, after the removal of the disease, when the morbid affection no longer obscures or vitiates the judgment, the mind will labor under a languor and debility, which, with reference to its former sound and unaffected state, might render its exertion and decisions very unequal and inferior, carries along with it weight; for I agree that the inferiority of mind would, in itself, be a degree of evidence to show that the disorder was not rooted out; (6) the convalescent state would incline to look forward to the removal of the disorder, but would not, of itself, show that the disorder was removed. It might allow of the party doing sound and discreet acts; but it would certainly require such acts to be watched, and examined with jealousy: (7) nothing could be more dangerous than to try the state of the mind by individual acts, in those cases in which the disorder is, as it is most frequently, *insanity quoad hoc*; at the same time, though partial insanity does frequently prevail, it must always be watched with infinite care, and it seems scarcely possible to extract, from any particular case of this kind, that which will apply to any other.

In *Coglan v. Coglan*, the judges seem to have thought that there was a clear interval, and this was proved by persons in the habit of watching the patient: such persons can best prove whether the derangement had entirely ceased, or whether there was a perfect interval. By a perfect interval, I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure; but an interval in which the mind, having thrown off the disease, had recovered its general habit.

In *Greenwood v. Greenwood*, which has been stated, the question turned upon this, whether a mind sound to general purposes, in the doing of a particular act, being influenced by a false imagination, an unreasonable persuasion, was not sufficient to avoid such act. (8) (a) A question of so great extent involves serious consideration.

[*445] *The present case, however, is free from all difficulties of that kind, for there is clear and distinct evidence of Elizabeth Barker having, at one period, been mentally incompetent. The woman who attended her was hired to attend, and did attend, her as an insane person; the medical man who attended her prescribed for her as such. Nor is

higher than appears in this report; saying, "that where lunacy has been once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before; and that it should be proved by evidence as clear and satisfactory." Lord Eldon expressed his dissent from such proposition. See in *Ex parte Holyland*, 11 Ves. 11.

(5) Vide etiam, per Lord Eldon C. in *Ex parte Holyland*, 11 Ves. 10, &c.

(6) This position seems sound, and much preferable to the one alluded to in note (4) *antea*.

(7) See also in *Ex parte Holyland*, 11 Ves. 11.

(8) See the circumstances of this case stated, 13 Ves. 89.

(a) See Chitty, *Med. Juris*. ch. 9, § 5, p. 358, 359.

there any contradiction in the evidence in this case; they who represent her as having talked reasonably about her property, certainly apprehended that such short effort of her mind made her capable of disposing, and that the disposition to her husband was proper: they did not mean to circumvent a weak mind: but I think they scarcely watched the means with sufficient attention: their characters are not impeached. It is, however, an agreed point, that she was once undoubtedly insane. But it is said, that this particular disease (*furor uterinus*) ought to be deemed a bodily disease; but if it were, and the effect of it produced this constant habitual derangement of mind, it comes to the same end. The jury, however, would not act upon this. The evidence does not prove it, and the medicines administered were not applicable to such complaint.

The jury were to try this question, with reference to the effect of an instrument, revocable in its nature; and therefore the directions, as to the time, were necessary. Nothing can more circumstantially mark an habitual derangement than the conduct of the husband with Mr. Alchorne. It is impossible to overlook what was the opinion of the husband; therefore it comes to the question of a person habitually deranged, and whether there was, between the paroxysms of the disorder, any clear decided lucid interval. I think it would be extremely dangerous to all property to say this, in such a case.

The verdict is clearly wrong in saying she was not insane at all; as all the witnesses agree that she was habitually insane; but whether there was a clear lucid interval is a much nicer question.

New trial granted. † (δ)

† Upon the new trial at Guildhall, 11th July, the jury found a verdict for the plaintiff.

(δ) See 1 Story, Eq. Jur. ch. 6, § 229, and note; 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (x); Cartwright v. Cartwright, 1 Phillim. 99, 120; Jackson v. Van Deusen, 5 John. 158; Sheldford on Lunatics, ch. 2, p. 35-74.

[Though it does not appear very distinctly in the present report, it is well known that Lord Thurlow went so far as to say, that where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before; and that should be proved by evidence as clear and satisfactory. Lord Eldon, in *Ex parte Holyland*, 11 Ves. 11, dissented from that proposition, and he then (as he has done on other occasions within the remembrance of the Editor) suggested the case of the strongest mind reduced by the delirium of a fever, or any other cause, to a very inferior degree of capacity; "the conclusion is not just, that as that person is not what he had been, that therefore he should not be allowed to make a will. There are frequent instances of men restored to a state of mind inferior to what they possessed before, yet it would not be right to support commissions against them." Another part of the doctrine here established was adopted by Sir W. Grant, in *Hall v. Warren*, 9 Ves. 611, and by Lord Erskine, in *White v. Wilson*, 13 Ves. 88, viz., that where general lunacy has been established, the proof is thrown upon the party alleging a lucid interval. This principle is thus admirably stated by Sir W. Wyane, in the luminous and elaborate judgment delivered by him in the case of *Cartwright v. Cartwright*, 1 Phil. Rep. 100. "If you can establish that the party afflicted habitually by a malady of the mind, has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption, for, until proof of habitual insanity is made, the presumption is, that the party, like all human creatures, was rational; but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason, must prove it." In that case, and in *White v. Driver*, same book 84, lucid intervals were established. — *Eden.*]

[*446] *DEL MARE v. REBELLO. [Vide S. C. 1 Ves. jun. 412.]

(No Entry.)

Testator left residue to the children of his sisters Estrella and Reyna; Estrella had children, Reyna had none, and had changed her name, and was a nun professed, but he had a third sister, Rebecca, who had children; this is not sufficient to substitute the name of Rebecca for Reyna. (1)

THE bill stated, that Jacob Del Mare, late of Kingston, in Jamaica, made his will 18th October, 1785, and thereby gave to the defendants, and other persons since deceased, "all his government securities in the public funds, which should be standing in his name at the time of his decease, in trust, among other things, to pay the residue and remainder of the interest and dividends of said government securities, unto all the children of his sisters, Estrella Del Mare Jalfon, and Reyna Del Mare, to be equally divided among them, share and share alike, during their lives," with remainders over, among them, and their issue; and the testator directed, "that in case the survivor of his said sisters' children should die without issue, then the residue and remainder of the interest and dividends of the said government securities or stocks should be equally paid and divided among the wardens of certain synagogues therein mentioned," upon trusts therein set forth, and appointed the defendant and the other trustees executors.

The testator died 30th September, 1789, one of the executors having died in his lifetime; the defendant and the other surviving executor proved the will, but the latter also dying, the defendant was the sole surviving executor.

The testator, at the time of his decease, left three sisters, viz. Estrella del Mare Jalfon, wife of Zacharias Jalfon, of Leghorn, in Italy, Maria Hieronyma (formerly called Reyna) Del Mare, who having changed her religion to that of a Roman Catholic, and having become a professed nun at Genoa, had changed her name to Maria Hieronyma, and Rebecca Del Mare, wife of Samuel Del Mare (uncle to the testator), and who, by him, was mother of the plaintiffs.

Estrella Del Mare Jalfon had, at the death of the testator, seven children (the co-defendants), all of whom, except one, defendant Abraham Jalfon, were abroad.

Maria Hieronyma (formerly Reyna) Del Mare, never was married, or had a child.

[*447] *The plaintiffs argued, by the bill, that being a nun professed, she could not be supposed to be the sister for whose children the testator meant to provide. The plaintiffs therefore contended, that the name Reyna Del Mare was inserted by mistake, and contrary to the intention of the testator, the said Reyna never having had a child, and having changed that name for that of Maria Hieronyma: nor could Reyna Del Mare be called by the name Del Mare, unless she had married a

(1) For the doctrine on these subjects, see 1 Roper on Legacies, 138 to 150. That a gift of a residue or legacy to a person not named cannot be supplied by parol evidence, see *Hunt v. Hort*, ante, 311; *Winne v. Littleton*, 2 Ch. Ca. 51; *Baylis v. Attorney-General*, 2 Atk. 239. With regard to good bequests under mistaken descriptions, either in the name or addition of a legatee, or where the christian name only has been left in blank, &c., see *Parsons v. Parsons*, 1 Ves. jun. 266 (above cited); *Price v. Page*, 4 Ves. 680; *Stockdale v. Bushby*, Coop. Ca. Ch. 239, and 19 Ves. 381; *Standen v. Standen*, 2 Ves. jun. 589, and *Holmes v. Custance*, 12 Ves. 279. Where the name of a person was correctly stated, but the description wrong and applicable to another person, a bequest was held void for uncertainty. *Thomas v. Thomas*, 6 T. R. 671.

man of the same name, as Rebecca Del Mare, the plaintiff's mother, had done.

The plaintiffs further charged, that the testator always corresponded amicably with their father and mother, but that he never corresponded with Reyna (otherwise Maria Hieronyma), who was to be considered as civilly dead; and that he frequently had expressed his intention of providing for the plaintiffs. The prayer of their bill, therefore, was, to be decreed to be respectively entitled to an equal share of the interest, &c., of the said residue, with the several children of Estrella Del Mare.

The only material defendant, Abraham Jalfon (as supporting the interest of his brothers and sisters), by his answer, put in issue the question of the insertion of Reyna's name by mistake, and claimed the residue (unless the said Reyna had a child or children) to belong to and be divisible among himself and the other children of Estrella Del Mare Jalfon.

The cause came on to be heard 3d February, 1792, when

Mr. *Solicitor-General*, and Mr. *Fonblaque*, for the plaintiffs, contended, that this was a case of mere mistake, by which the testator had inserted the name of Reyna instead of Rebecca. That it was very nearly the case of *Bradwin v. Harper*, Amb. 374, where the testator gave, by mistake, one moiety to Anne, who was dead at the time, and the Court there corrected the mistake. It was also like the case of *Parsons v. Parsons*, (2) [8th Feb.] 1791, where the testator gave a sum of money to secure an annuity to his brother Edward Parsons, and, after his death, to be divided among his children; the testator had had a brother named Edward, but he was dead at the time of making the will, and had left no child; but he had a brother, named Samuel, at the time of making the will, who had a wife and children, and it *was in evidence that the [*448] testator had been in use to call Samuel by the name of Ned; the Court decreed in favor of Samuel, upon the ground of clear mistake. Here the testator could not mean the sister, who, whilst she was a Jewess, was called Reyna. She had changed her name; her legal name was now Maria Hieronyma, and she was no longer in the situation (as the testator knew) to have children, being a nun professed; he thereupon must have meant Rebecca, who had a family to provide for. In this case, parol evidence is admissible. If the gift had been to Reyna herself, as she had changed her name, if she found it necessary to sue here, she must have shown that she was the person who had been called by the name of Reyna; and if she could be put to evidence to prove her title, that evidence might have been rebutted by any other, to show that she was not the person intended. It is true, the Court is very delicate as to the admission of parol evidence to explain wills; but it is necessary, where there is a latent ambiguity. In both the cited cases, parol evidence was admitted. In *Ulrich v. Litchfield*, 2 Atkyns, 372, Lord Hardwicke said, it was one of the cases proper for parol evidence, where there has been a mistake in a christian or surname.

Lord CHANCELLOR, during the argument, expressed great doubt whether parol evidence had ever been admitted to this extent. He said, in both the cases, there were articles of description which pointed out the persons intended.

His Lordship directed the evidence to be read.

The only deposition read was that of the defendant Rebello, who swore

to his knowledge of the defendants, but that he never knew Reyna Del Mare, and never heard that such a person existed, till upon the death of the testator, when application was made to him on her behalf, to know whether she was entitled, as one of his sisters, to anything under his will. That this application was made to him as one of the executors; that he afterwards found, from the information he received of her from the family, that she had changed her religion when young, and also her name, to that of Maria Hieronyma, and became a professed nun at Genoa, and was never married, nor had any child, and was a professed nun at the time the testator made his will, and had been so for a great number of years; that he believes the plaintiffs to be the children of Rebecca Del Mare, [*449] and that Rebecca was the sister for *whose children the testator meant to provide, and that the insertion of the name Reyna was a mistake, and that the testator meant to have inserted Rebecca; and, as the reason of his belief, he stated several conversations with testator (3) as to his will, in which he always understood that the nephews and nieces which testator meant were the children of his two sisters at Leghorn, and never heard testator speak of having a sister at Genoa; and that the testator corresponded with Samuel Del Mare, the father of plaintiffs, and also with Estrella, but he never saw any letters from testator to Reyna, or Maria Hieronyma, or any correspondence between her and testator, though he is in possession of the papers, &c. of testator. He also spoke of the residence of the other defendants, the children of Estrella Jalfon, with their father and mother at Leghorn. (3)

Mr. Lloyd, and Mr. Finch, for the defendants, contended, that, in this case, the parol evidence ought not to have been read. By the gift to the children of the testator's sisters, those born at the death of the testator would have taken; and if Reyna had any children, they must have had shares.

The case of *Parsons v. Parsons* (4) does not apply to the present: there was, in that case, no person in existence of the name of Edward, to take; but it was in evidence, that the testator used to call Samuel Ned. The only cases in which parol evidence is read, are, 1st. Where it is given to persons by wrong names, though the persons who are intended, exist; and then evidence is read to show, that the persons claiming were intended. 2dly. Where there are two persons of the same name, as in the case put in Lord Coke's Reports, 5 Co. 68, there evidence is read to point out which was the person intended. Where persons are called by wrong names, it is sufficient if there are descriptions to point them out. This was the case in *Bradwin v. Harpur*; there were children and grandchildren to whom the legacies were intended to be given: Mr. Ambler, in that case, cited *Beaumont v. Fell*, 2 P. Wms. 141, where it was insisted there was no such person as the one named, upon which the Master of the Rolls laid great stress. Now here there is a description of a person who could take. In *Dousett v. Sweet*, Amb. 175, the gift was to the son and daughter of William Wicker; he had four sons and one [*450] daughter. It was contended, the eldest son was *meant to take,

(3) Although Sir William Grant, M. R., observed, in *Holmes v. Custance*, 12 Ves. 281, that [the whole effect of] the evidence in the principal case was very strong, amounting to a high degree of probability that the testator meant his sister Rebecca, the substance of the testator's declarations to that effect were very weak. From Sir J. Simeon's contemporary note, and Mr. Finch's brief.

(4) 1 Ves. jun. 266.

and evidence was offered; but Lord Hardwicke would not admit it, and gave the whole to the daughter. (5)

It is admitted, that here the parol evidence would be in contradiction of the will. In the case of *Brown v. Schoyn*, Lord Talbot refused to admit the evidence of the instructions, being different from the will; and said it was better to suffer a partial mischief than a general inconvenience.

In the present case there was a person who bore the description; she was still Reyna Del Mare: the change of name was only an addition, which those ladies always take. She might have sued for the legacy, if given to her; for a monk or nun may sue here for a legacy by their own name; profession is no disability. The nun might be released from her vows, marry, and have children.

Mr. *Solicitor-General*, in reply. The part of the case of *Dowsett v. Sweet*, referred to in the note of *Bradwin v. Harpur*, is not that cited by Mr. Lloyd; it is the former part of the case which applies. Here, if Reyna had been confirmed by the name of Maria, and had sued for the legacy, she must have shown by evidence, that her name had been Reyna, and that evidence might have been rebutted. In *Parsons v. Parsons* there was no such person as Edward; so here there was no such person as Reyna Del Mare; there is, therefore, a latent ambiguity, as there appears to be no Reyna till the evidence shows that Maria Hieronyma had been called Reyna.

Lord CHANCELLOR said, part of the policy of giving persons professed other names was, that they might not interpose in the world; but any argument from a child being baptized by one name, and confirmed by another, would not apply here.

Here the testator had it not in contemplation, whether his sisters had children or not, at the time of making his will.

The time of distribution goes but a very little way toward discovering the intention of the testator; it would be doubtful, in such a case, whether it should be confined to the time of the death, or whether what appeared to be his general intent could not be let in.

*He takes no notice, in his will, of Reyna being confined in a [*451] monastery; there is no intimation of his intention of excluding her; which there probably would, had he intended it. I am sufficiently satisfied he knew of Rebecca's family.

The cause stood over, and, on a subsequent day,

Mr. *Solicitor-General*, on the part of the plaintiffs, applied to the Court for a reference to the Master, for the purpose of an inquiry as to further evidence in support of the testator's intent.

Lord CHANCELLOR. I have duly considered of this case, and am of opinion, that the evidence is not sufficient to induce me to presume, that the testator meant his sister Rebecca instead of Reyna; therefore the bill must be dismissed. (a)

(5) Lord Hardwicke's rejection of the evidence, in *Dowset v. Sweet*, seems very questionable. See 1 Roper on Leg. 144. Lord Thurlow's observations with reference to it, in the contemporary report, in 1 Ves. jun. 416, are as follows:—

"It is almost impossible to say that, if there is a bequest to the son and daughter of one who, at the time of the bequest, has four sons and a daughter, there is not such a dissonance between the state of the facts and of the bequest, as to let in satisfactory evidence that one son was meant; for it is clear he meant one. It is within all the rules of latent ambiguities; therefore I fancy the Court, in that case of *Dowset v. Sweet*, went upon the ground that the evidence was not sufficient to show the intention, and then it became uncertain." See also *Careless v. Careless*, 1 Meriv. 394, et seq.

(a) See Wigram on Extrin. Ev. Prop. 2, pl. 28, et seq.; Prop. 6, pl. 121; Hunt v. Hort,

ante, 311, 313, and note; 3 Phil. Ev. (Cowen & Hill's notes) 1284, 1385, 1386; 1 Story, Eq. Jur. ch. 5, § 180.

[So in *Andrews v. Dobson*, 1 Cox, 428, where a legacy was given to "James, the son of Thomas A." and there was no such person, the Court would not admit parol evidence to show that it was meant for "Thomas, the son of James A." But in many cases of wrong or imperfect descriptions of legatees, parol evidence has been admitted. *Hussey v. Berkley*, 2 Eden, 194; *Parsons v. Parsons*, cit. sup.; *Abbot v. Massie*, 3 Ves. 148; *Smith v. Coney*, 6 Ves. 42; *Careless v. Careless*, 1 Meriv. 384. That a blank cannot be supplied by evidence, vide *Hunt v. Hort*, ante, 311, but that a blank for a christian name may, *Price v. Page*, 4 Ves. 680. A great number of cases upon this subject are collected in the Editor's notes to *Stephenson v. Heathcote*, 1 Eden, 38, and *Fonnereau v. Poyntz*, ante, vol. i. 472. In *Fox v. Collins*, 2 Eden, 107, there were two specific legatees of the same name, to one of whom the residue was bequeathed. Lord Northington collected from the general intent apparent on the face of the will, without parol evidence, which it was intended for. That an inaccurate superadded description of objects will not vitiate if they are in other respects correctly described, vide *Standen v. Standen*, 2 Ves. jun. 589; affirmed in *Dom. Proc.* 6 Bro. P. C. ed. Toml. 193; *Kennett v. Abbott*, 4 Ves. 808; *Smith v. Campbell*, *Coop. Ch. Rep.* 278, unless there be fraud, from whence it may be presumed that if known, the legacy would not have been given. As to false allegations and superadded descriptions of property in a devise, or in a grant, vide *Roe v. Vernon*, 5 East, 64, and the several cases there cited; the distinction being, that when the particular thing is once sufficiently ascertained, the addition of a false or mistaken allegation, will not frustrate it, but where it is in general terms, the addition of a particular circumstance will operate by way of restriction and modification. Vide also *Williams v. Williams*, ante, vol. ii. 87; *Whitfield v. Clement*, 1 Meriv. 402. — *Eden*.]

BURT v. BARLOW [BARHAM].

(No Entry on this Occasion.)

Bond given for a certain sum, which was calculated to be the amount of a residue of a personal estate, it turns out the sum is miscalculated: bill to have the bond considered as a security only for the real sum, dismissed. (1)

BLENCOW being seised of real and possessed of personal estate, made his will, dated 13th October, 1774, duly attested for passing real property, and thereby, after directing the payment of debts, he gave and devised all his real estates to his wife, Anne Blencow (since deceased), and her assigns, during her natural life, remainder to his sister, Margaret Boyce (deceased), for life; and, after her decease, he directed his estate to be divided into four parts, and devised one undivided fourth part thereof to his niece Catherine Burt, the plaintiff's late mother (deceased), for life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail male, with remainders over. And as to, for, and concerning the residue of his personal estate, the testator willed that an inventory should be taken of the same by his executors and executrix, and exhibited in the Ecclesiastical Court; and he gave his said wife Anne Blencow the use, but not the property, of his said personal estate for life; remainder to his sister, Margaret Boyce, for life; and after her decease he gave and bequeathed his said personal estate unto and among all and singular his nephews and nieces, namely, James Smith, the said Catherine Burt, plaintiff's said late mother, Elizabeth Willis, and [*452] Mary Boyce, equally to be divided between *them, share and share alike, at their respective ages of twenty-one years; and testator appointed his wife and others executors and executrix of his said will.

(1) This was unlike the cases of parties acting under a thorough misconception of their rights, or of the probable amount of the value of them, as in *Cocking v. Pratt*, 1 Ves. 400, and *Supplement* to Ves. sen. 176, et seq.; *Bingham v. Bingham*, 1 Ves. 126, and *Supplement*, 79; *Ramsden v. Hilton*, 2 Ves. 304; *Supplement*, 380; *Evans v. Llewellyn*, ante, 2 vol. 150, and 1 Cox, 323. See per Lord Thurlow, postea, 454.

Blencow died without revoking this will, and the widow and executors proved the will, possessed assets, and paid the debts; and the surplus of the personal estate amounted to 1140*l.* only, though it was supposed at the testator's death that there would be a surplus amounting to 2400*l.* at least.

Anne Blencow, and Margaret Boyce, are since deceased.

Catherine Burt had two children, the plaintiff and Elizabeth, who some years ago intermarried with the defendant, Barlow; and Catherine Burt considering that the plaintiff would be entitled, at her death (she surviving Anne Blencow and Margaret Boyce), to a fourth part of the testator's real estate, which she conceived to be nearly equal to one fourth of the personal estate, which she (Catherine Burt) would be entitled to on the death of the said Anne Blencow and Margaret Boyce, proposed to secure to said William Barlow the fourth part of the said personal estate, which it was supposed would amount to about 600*l.*, and executed a bond, by which she bound herself and her heirs, &c., in the penal sum of 1200*l.* with a condition, reciting the will and death of John Blencow, and that it had been computed the proportionable part of the residuum of his personal estate, to which she (Catherine Burt) would be entitled, on the decease of the survivors of Anne Blencow and Margaret Boyce, would amount to the sum of 600*l.*, and also reciting that the said Catherine Burt had agreed with the defendant Bar[ham], who had married Elizabeth her daughter, that in order to make him certain of receiving a proportionable share of the estate of the said John Blencow, she should enter into a bond to pay him the sum of 600*l.*, within three months after the death of the survivors of them the said Anne Blencow, Margaret Boyce, and Catherine Burt: the condition of the bond was, that the heirs, executors, or administrators of Catherine Burt, should pay unto defendant Barlow, his executors, or administrators, such sum of 600*l.*

Catherine Burt survived Anne Blencow and Margaret Boyce, but died 11th May, 1782, having first made her will, and appointed the plaintiff sole executor, and thereby (as appeared by the *defendant's answer), after taking notice of said bond, gave to the defendant the said sum of 600*l.* The plaintiff proved the will, and possessed himself of the estate and effects, and among other things of 285*l.* being the whole of her fourth part of the residue of the said John Blencow's personal estate, and, upon application from defendant Bar[ham], to pay him the sum of 600*l.* secured by the bond, informed him that the fourth part of Blencow's estate amounted only to such sum of 285*l.*, and that it was the intention of Catherine Burt, only, to secure by the said bond, payment of the amount of the fourth of such residue, and offered to pay him such sum; and upon his refusal, offered to have his plaintiff's, fourth part of the real estate (to which he was entitled under Blencow's will, as tenant in tail, and of which he had suffered a recovery) valued, and to have the value thereof added to the said sum of 285*l.*, and then to divide the whole produce equally between them, which the defendant Bar[ham] also refused, and commenced an action, in the Court of King's Bench, against plaintiff, as executor of said Catherine Burt, upon the bond; whereupon the plaintiff filed the present bill, charging that the bond was only given in order to secure such sum as the fourth part of the residue of the testator John Blencow's personal estate should produce; and that such share had produced 285*l.* only, and praying that the condition of the bond might be rectified and made according to the intention of said Catherine Burt, and defendant Barlow be decreed to deliver the same up

to be cancelled, on payment of 285*l.*, and in the mean time he might be restrained by injunction from proceeding in the action.

The defendant put in an answer, by which he insisted that the bond was given to secure him at all events the sum of 600*l.*, but admitted it was understood at the time, that Catherine Burt's share of the residuary estate of the testator would amount to that sum.

Mr. *Mitford*. This bill is brought to have the sum rectified, the plaintiff insisting, that it was a mistake in the calculation of the testator's property; and, being a voluntary bond, the Court ought to admit evidence of this miscalculation, and rectify it.

This instrument must be made conformable to the intention of the parties. There is express evidence of the instrument itself, [*454] *which, upon the face of it, in fact, gave to the party interested in it the value of the property she should be entitled to. It was not a liquidated sum, being supposed to be 600*l.* or thereabouts. A voluntary instrument, executed for no other purpose than that of securing her son-in-law's share. If it was a bond for valuable consideration, it is clear, that, according to the principles of former decisions, this evidence ought to be received, and the mistake rectified: it has been so held in cases of policies, and the principle is particularly laid down and acknowledged by Lord Hardwicke in *Henkle v. The Royal Exchange Assurance Company*, 1 Vesey, 317, who says there is no doubt this Court will relieve against mistakes in written contracts, as well as against fraud, upon proper proof. Your Lordship held the same doctrine in *Taylor v. Rudd*, 25th June, 1785. That was a case, in which there had been a mistake in fact, as well as law, observing, that such a mistake might be rectified by parol evidence, but care must be taken to establish proof of the mistake, which, in that case, was not done; this is in nature of an instrument for the purpose of the parent's securing a provision for her child. The obligor had no other object in view than to secure to her son-in-law this proportionable share. The evidence we have to offer is, that the plaintiff has absolutely received no more than the sum of 285*l.*, as the whole value of the personal estate; and therefore it ought to be admitted, and the mistake in this bond rectified.

Lord CHANCELLOR. You have no distinct evidence of the mistake; had the party acted upon the idea of a general speculation, and you had offered evidence to show what the intention of the party was, perhaps such a bond as this might have been rectified. Supposing it had turned out to have been more instead of less, you would also have claimed that surplus. No case touches this point. (2) It is not like that of the son being deceived in the property, and who had stated to his mother that there were 2000*l.* in the Bank, and she had, in consequence of his statement, secured that sum, and afterwards it appeared that there was no such sum. (a)

Bill dismissed.

(2) Vide note (1), *ante*, p. 451.

(a) See 1 Story, Eq. Jur. ch. 5, § 124, and note; § 153, and notes; *Irnham v. Child*, 1 Bro. C. C. 94, and notes and cases cited; *Rich v. Jackson*, 4 Bro. C. C. 519, and cases cited. See particularly *Portmore v. Morris*, 2 Bro. C. C. 219, and notes; *Pember v. Mathers*, 1 Bro. C. C. 54, and note (a) at the end of the case, in reference to rectifying mistakes in written contracts.

*BAL[D]WYN v. JOHNSON.

[*455]

(Reg. Lib. 1791. A. fol. 117.)

Executors divide a part of their testator's property, but lodge a sum in the funds for securing the payment of an annuity; as to this they are joint-tenants, and it shall survive upon the death of one, to the other. (1)

THIS bill prayed, that the defendant Johnson might transfer the sum of 500*l.* 4 per cent. annuities, into the names of himself and the plaintiffs, or such other person as the Court should think proper, that the same might be secured, so as to answer the annuity of 20*l.* to Mary Stone, during her life; and that upon her death the plaintiffs as executors of the testator James Marye, who was joint executor in the will and codicil of J. Harford, might receive and enjoy the benefit of one moiety thereof. It stated, that the testator J. Harford, by his will dated 7th September, 1787, after devising all his real estates as therein mentioned, gave to Mary Stone an annuity of 20*l.* payable out of his personal estate, and appointed the defendant Johnson executor; that he added a codicil thereto, whereby he appointed James Marye joint executor with the defendant Johnson; that upon his death Johnson and Marye proved the will and codicil, and possessed the testator's assets, and that, after payment of the testator's debts and legacies, there remained 500*l.* 4 per cent. bank annuities still standing in the testator's name, and which the bill charged, was set apart to answer and pay the said annuity of 20*l.* to Mary Stone during her life, and the dividends and interest have been accordingly paid to her. That the testator did not dispose of the residue, and that consequently the two executors became entitled thereto, equally, share and share alike, and particularly to the sum of 500*l.* subject to the annuity of 20*l.*, that Mary Stone as the sole next of kin, had executed a release to the executors, Johnson and Marye.

That James Marye is deceased, having by his will appointed the plaintiffs executors thereof; and they, as his representatives, claim one moiety of the said 500*l.*, subject to the payment of the annuity for the life of Mary Stone, insisting that the said James Marye and Johnson, though they might have been joint-tenants of such residue, the same had been severed by the said James Marye and Johnson, for that the defendant Johnson and the said James Marye did transfer 300*l.* 4 per cent. bank annuities, part of the residue of the testator's personal estate, to the defendant Johnson, and the like sum, other part of such residue, to the said James Marye, and also 350*l.* East India annuities, other *part of the residue of the testator's personal estate to the defend- [*456] ant Johnson, and the like sum, other part thereof to the said James Marye; and, therefore, that the said James Marye and the defendants were entitled to the said 500*l.* 4 per cent. bank annuities, as tenants in common, in consequence of such severance.

Mr. *Solicitor-General*. This joint-tenancy has been severed by the transfer of several parts of the residue to the defendant Johnson and Marye, being distributed in equal shares between the executors, who likewise joined in appropriating this sum of 500*l.* for this annuity of 20*l.* to Mary Stone. These circumstances clearly amount to a severance;

(1) Vide *S. P. Frewen v. Relfe*, ante, 2 vol. 220, et seq. with the references in the Editor's notes; as also *White v. Williams*, 3 Ves. & Beam. 72, 75.

and the plaintiffs have a right to have this fund secured for his benefit, subject to the annuity of Mary Stone.

Lord CHANCELLOR. You come to divide this sum, because you have divided the other parts of the residue. There is nothing in it: I must dismiss the bill with costs.

Mr. *Lloyd*, on the other side. As to the severance of the whole residue, that cannot extend to this 500*l.*, as nothing more was done than to let it continue in the testator's name for the payment of the annuity. Where two joint-tenants have made a division of some part of the property, that act cannot make any alteration or amount to a severance, as to what may still remain. *Willing v. Baine*, 3 Wms. 113, there the Court held it to survive, except as to what had been actually divided. *Frewen v. Relfe* (ante, vol. ii. p. 220).

Lord CHANCELLOR. It seems to have been the mutual wish of both parties to run the hazard of survivorship as to this sum of money.

Mr. *Solicitor-General*. The difference between the cases cited and this, is, that here the executors did actually divide all they could possibly touch; they were obliged to let this sum remain, to answer the annuity; every sixpence capable of division was divided. There is a clear equity to sustain the bill, if it is for nothing more than to secure this annuity, though we cannot deny that the annuitant is not a party. [*Hall v. Digby*,]

3 Brown's Parl. Cases, 224, (2) is a strong case of severance, Cro. [*457] El. 33; 1 Salkeld, 158. This 20*l.* a year is a *charge upon the

whole residue, and the executors leaving this sum to answer the annuity, affords a strong circumstance of intention to show they did not mean it should survive: it is stated in the answer, that this sum was so appropriated by them.

Lord CHANCELLOR was then inclined to direct the fund to be paid into Court, and that the annuity should be paid to Mary Stone, with liberty for the parties to apply upon her death: but, after some opposition from Mr. Lloyd, he at length dismissed the bill with costs. (a)

(2) And in the 8vo ed. 577.

(a) See 1 Williams, Ex. Pt. 2, B. 4, ch. 1, p. 593; 2 ib. Pt. 3, B. 3, ch. 5, § 1, p. 893; *Frewen v. Relfe*, 2 Bro. C. C. 220, and cases cited; *White v. Williams*, 3 Ves. & Bea. 72.

[The question of severance was very elaborately discussed by Lord Eldon, in *Jackson v. Jackson*, 9 Ves. 591, in which his Lordship, upon an appeal from a decree at the Rolls, 7 Ves. 535, was of opinion, that though the residuary legatees took as joint-tenants leasehold and personal estate embarked in trade, yet that upon all the circumstances and the transactions of twelve years, a severance was to be implied. Vide also *Swaine v. Burton*, 15 Ves. 370. For the cases upon the subject of executors taking as joint-tenants, vide *Perkins v. Baynton*, ante, vol. i. 118, and *Frewen v. Relfe*, *White v. Williams*, ubi supra. — *Eden*.]

HANKEY v. GARRAT.

[Vide S. C. 1 Ves. jun. 236.] [Mr. J. Buller, Master Halford, and Master Ord, for the Lord Chancellor]

(Reg. Lib. 1791. A. fol. 141. b.)

Where there is a joint commission against partners, and a separate commission against one, the assignees, having taken possession of the whole fund, must divide it among the joint creditors; and the separate bond-creditors of the other partner cannot claim against them. (1)

WOOLDRIDGE and Kelly were partners in trade, and failed in 1777; and, Kelly then residing in the Danish island of St. Thomas, a commission of bankruptcy was issued, dated 10th July, 1777, against Wooldridge, by the description of Thomas Wooldridge, of the Crescent, London, merchant, in partnership with Henry Kelly, late of the same place, merchant: Holland Pope and John Hawkins were chosen assignees. Pope died soon after, and Hawkins became insolvent in 1779. In 1780, the defendants, Garrat and Rowlatt, were chosen assignees, and received from Pope's representatives and from Hawkins a considerable sum of money arising from the joint property of Wooldridge and Kelly.

Afterwards an action was brought against Kelly, on which he was outlawed, and a joint commission was issued against both (though Kelly was abroad, and had committed no act of bankruptcy), but this outlawry was afterwards reversed, and the commission superseded.

The assignees having in their hands 'about 3000*l.* or 4000*l.*, in April, 1784, and in December, 1787, petitions were presented by joint creditors, praying for a dividend; in consequence of which, and an order for that purpose, the commissioners ordered a dividend of 1*s.* in the pound to be paid out of the separate effects of Wooldridge, and out of a moiety of the joint effects of Wooldridge and Kelly; but refused to divide the other 'moiety of the joint effects, conceiving that their jurisdiction [*458] did not extend to it.

A few months after, the assignees having received between 2 and 3000*l.* more, another petition was presented for the purpose of obtaining Lord Chancellor's order for the division of the whole, which came on to be heard in January, 1789, when his Lordship being of opinion, that he could not make such order on a petition, recommended that a bill should be filed, and dismissed the petition.

In consequence of this, the present bill was filed, 31st January, 1789, and after several delays and answers put in, [exceptions taken, &c., final answers came in 20th January, 1790, by which they admitted the sums come to their hands, but, with respect to the uses made of them from time to time (which was particularly interrogated to in the bill), Garrat admitted the money in his hands had been lent to his partners, and that he was paid interest for it at five per cent. to the amount of 695*l.* 11*s.* 9*d.*; Rowlatt said he had also lent the money he received to his partnership, but had been paid no interest for it.

After the original bill filed, Kelly died, leaving his sister, Mrs. Wool-

(1) Vide *Christ. Bank. L.* 2 vol. 57, 66, 11 Ves. 86. Per Sir William Grant, *M. R.*, in *Everett v. Backhouse*, 10 Ves. 98; *Cooke's B. L.* 261 (5th ed. and 247, 5th ed.). As to joint creditors coming in under a separate commission, see the Editor's note to *Ex parte Cobham*, ante, 1 vol: 576, and *Ex parte Janson*, 3 Madd. Rep. 229. The above arrangement is now generally effected upon petition only. See *Cooke, B. L. ubi supra*, and the other references.

dridge (the widow of Wooldridge, who was also dead), his nearest relation, who administered to him; and the bill being amended, and she made a party, by her answer claimed the property in question, as his representative, and also as a bond creditor.

The cause coming on to be heard in Michaelmas term, 1790,

Mr. *Hardinge*, for the plaintiffs.

There are two questions,

1st. Whether the assignees can compel the administratrix to pay the joint estate to them.

2d. Whether a separate bond creditor can come in before the joint creditors are paid.

In the present case the joint estate has been applied by the assignees for their own benefit. This is a clear ground for interest at the usual rate: for it has been determined, that wherever trustees have made use of trust-money, they shall pay interest for it, at the usual rate; with-
[*459] out reference to what interest *they have actually made: and the delay used in this case will be a sufficient reason for the defendants to pay the costs.

The assignees objected to any dividend beyond the moiety of the joint effects; the bill prays a division of the whole fund.

Here is a joint fund got into the hands of separate assignees; out of whose hands it cannot be taken, but by the joint creditors.

Mrs. Wooldridge claims it for the purpose of paying Kelly's separate creditors; so that it is a question between the joint and separate creditors. It so happens, that one of the separate creditors is administratrix; but the only effect that can have, is between her and the other specialty separate creditors.

Then it is Kelly, by his administratrix, claiming against the joint creditors.

What is a partnership? Partners are joint-tenants of the joint fund; the consequence is, that one can retain the whole fund; the one has no claim on the other but upon the settlement of accounts. *Fox v. Hanbury*, Cowp. 448; *Smith v. De Sylva*, Cowp. 469.

Suppose Wooldridge had paid the joint debts out of the fund, Kelly could not have recovered but on an account.

As between a surviving partner and the representative of the deceased partner, the survivor at law has the whole right, though he is a trustee; but he acts fairly if he pays all the joint debts, and pays over a moiety of the surplus.

Here the assignees are tenants in common of one moiety, and, by chance, they have the other moiety in their possession, but they must pay it to the joint creditors, as appears by the principles laid down in *West v. Skip*, 1 Vesey, 242. There is no case in the books in point with this, but the principle is laid down in several cases. In *Goss v. Dufresnoy*, stated 1 Cooke's Bankrupt Law, 289, the partnership debts were ordered to be first paid.

Mr. *Solicitor-General*, and Mr. *Mansfield*, for the assignees. The commission was, to all intents, a separate commission, but joint debts were proved under it.

[*460] *Kelly's moiety of the joint fund, is a fund not to be distributed under the bankruptcy. If Kelly had received the moiety, and paid separate creditors with it, the payment would be good.

There is a real difficulty, in this case, as to Kelly's moiety of the fund. The assignees have distributed the moiety among the creditors, but did

not think themselves entitled to distribute the remaining moiety during Kelly's life. It was Kelly's money in their hands, and he could not have made them pay interest, as they were only his simple contract creditors. They were persons not interested (being not even creditors), appointed by the creditors to get in the fund, and have kept the money by necessity; they ought not, therefore, to pay interest; and, as the suit was made necessary by the doubts entertained, they should not pay costs.

Mr. *Graham*, rising on behalf of Mrs. Wooldridge the administratrix, Lord Chancellor stopped him, saying that the point would be reserved to him, whether the separate creditors were first to be paid out of the moiety before the joint creditors. His Lordship said, that where one partner is solvent, and the other bankrupt, the assignees can do no justice without dividing the joint estate among the joint creditors; for they are joint-tenants of the whole, if they can get it in.

It was referred to the Master, to take an account of the joint estate of Wooldridge and Kelly, and of the separate estate of Wooldridge come to the hands of the defendants the assignees, and to the hands of the defendant Susannah Wooldridge, as administratrix of Kelly, and to inquire whether the respective partnerships of the defendants Garrat and Rowlatt, had paid them any interest for such parts of the estate of Wooldridge and Kelly as came to their hands, and that they should be charged with such interest, and that the Master should compute interest at 4 per cent. on the rest of the money which came to their hands from the time of their receiving the same; (2) and the Master was to inquire, what creditors had sought relief under Wooldridge's commission, and which of them were joint creditors, and whether any of the joint creditors had not proved: and his Lordship declared, that the joint creditors of Wooldridge and Kelly were to be considered as creditors on their joint estate, and that the assignees should *pay the 3166*l.* 16*s.* 4*d.*, admitted to be in [*461] their hands, into the bank, and the same should be laid out in trust in the cause; and reserved further directions, till the Master should have made his report.

Upon the 29th November, the Master made his report, and thereby certified, that he had taken the accounts as directed; and that it was admitted before him, that there had come to the hands of defendants, Garrat and Rowlatt, of the joint estate of Wooldridge and Kelly (including a sum of 450*l.* 18*s.* 5*d.*, arising from the separate estate of Wooldridge as after mentioned) the sum of 6764*l.* 1*s.* 5*d.*, and that they had expended, on account of the joint estate, sums amounting to 3199*l.* 13*s.* 2*d.*, which left a residue in their hands of 3564*l.* 8*s.* 3*d.*, and that it was admitted, there had come to their hands, of the separate estate of Wooldridge, the sum of 450*l.* 18*s.* 5*d.*, which made part of the money received by the defendants from Pope and Hawkins, the former assignees of Wooldridge, and which had been divided among the creditors who had proved under Wooldridge's commission, and that there was not anything remaining in the hands of the defendants, Garrat and Rowlatt, of the separate estate of Wooldridge, except five Treasury orders of 100*l.* each, bearing an interest of 3*l.* 10*s.* per annum, taken in pursuance of the acts for giving relief to American sufferers, to Susannah Wooldridge, and the defendants, Garrat and Rowlatt, jointly; and that the defendant, Susannah, had not in her possession any part of the joint or separate estate. He then found that de-

(2) Vide *Treyes v. Townshend*, *antea*, 1 vol. 384, and the Editor's notes.

defendants, Garrat and Rowlatt, had, on the 15th of March, 1791, paid the sum of 3166*l.* 16*s.* 4*d.* into the bank (which had been laid out in the purchase of 3897*l.* 12*s.* 6*d.* bank three per cent. annuities), and which being deducted out of the balance in their hands, the same was reduced to 397*l.* 11*s.* 11*d.*, and it was admitted before the Master that the partnership in which the defendant, Garrat, was concerned, had paid him interest for such part of the joint estate of Wooldridge and Kelly as had come to his hands, 695*l.* 10*s.* 9*d.*, which was all the interest made by defendant, Garrat, of the joint estate, at the time of paying the money into the bank; and that the defendant, Rowlatt, had been paid, from the copartnership in which he was concerned, for interest on such part of the joint estate as had come to his hands, 309*l.* 19*s.* 10*d.*, which [*462] was all the interest made by him, at the time of the payment made into the bank; and he certified that he had computed interest on the remaining sum of 397*l.* 11*s.* 11*d.*, the balance in the hands of defendants, Garrat and Rowlatt, from the 3d March, to the 29th November, and the same amounted to 11*l.* 14*s.* 8*d.*, and that he had, in the third schedule to his report, set forth an account what joint creditors had proved under Wooldridge's commission, and the sum proved by each, and the dividend paid to each, and that one person only who had not before proved, Andrew Verrier, had come in before him and proved a joint debt of 22*l.* 19*s.* 6*d.*, and that no sums of money (except the dividends) had been received by the said joint creditors.

The cause came on for further directions on the Master's report, on the 8th February, before Mr. Justice Buller, sitting for the Lord Chancellor, when

Mr. *Graham*, shortly argued on the part of Mrs. Wooldridge, that she was entitled to a priority with respect to the second moiety of the joint estate; and that the assignees could only divide one moiety among the joint creditors, but

Mr. Justice *Buller*, thought the assignees must administer all the joint assets in payment of the joint creditors, and that Mrs. Wooldridge had no priority against them; and, therefore,

Referred it back to the Master, to tax all parties their costs, and ordered the 3897*l.* 12*s.* 6*d.*, standing in the name of the Accountant-General, in trust, in the cause, to be sold; and that the money to arise from the sale, together with the cash in the bank, and the interest upon the 3879*l.* 12*s.* 6*d.* until the sale, should be paid to the defendants, Garrat and Rowlatt, the assignees, who were to apply the same, together with the 1408*l.* 17*s.* 2*d.* reported due from them, in payment, first of the costs, and then to divide the residue *pari passu* among the creditors named in the third schedule to the Master's report, and to Andrew [Vezian], a creditor who had proved a debt before the Master; and, by consent, it was ordered that the five debentures mentioned in the report to be in the hands of the assignees, should be delivered up to the defendant, Susanah Wooldridge. (a)

(a) This equity had been established in a very early case, *Richardson v. Gooding*, 2 Vern. 293. Lord Eldon, in *Barker v. Goodair*, 11 Ves. 85, alluding to its being the practice in bankruptcy, not to permit execution even by a joint creditor, but to distribute the joint effects even in the absence of the solvent partner, observed, that a question had often occurred, whether a separate creditor taking a moiety of the chattels in execution, may call for the sale of that chattel, and divide the money; or whether the Court would force upon him the whole account of the partnership, permitting him to take only that interest which the partner his debtor would have been entitled to after the account. The extensive terms in which this doctrine was laid down by the Court of Exchequer, in *Taylor v. Fields*, 4 Ves. 397,

seems to embrace this and every other question of the sort, which may arise. It is there said, that, whether a person for valuable consideration sells his interest in the partnership trade, or his next of kin or executors take it upon his death, or a creditor takes it in execution, or the assignees under a commission, the mode makes no difference; but in all those cases the application of the rule takes place, that the party coming in the right of the partner, comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner, and it is an item in the account, that enough must be left for the partnership debts. In *Parker v. Pistor*, and *Chapman v. Koope*, 3 B. & P. 288, 289, it was attempted, on the authority of that case, and of *Eddie v. Davidson*, Dougl. 650, to compel plaintiffs who had taken partnership goods in execution, to enter into the account between the defendant and the other partners, before they should have the fruits of the execution; and it was said, that the Court of King's Bench, on a similar application, had driven a plaintiff to consent; but the Court of Common Pleas refused to interfere with the assertion of the fair common law right. See upon the subject of joint and separate estates, *Ex parte Hodgson*, ante, vol. ii. 5; *Ex parte Champion*, ante, 440; *Anderson v. Maltby*, post, vol. iv. 423. — *Eden*.

*ISAAC v. HUMPAGE and Others.

[*463]

[S. C. 1 Ves. jun. 427.] Mr. J. Buller for the Lord Chancellor.

(Reg. Lib. 1791. A. fol. 162. Entered *Isaac v. Hogarth*.)

Affidavits read, upon an application for an injunction to restrain execution on a verdict at law, (1) after answer put in. (1)

THE defendant, Humpage, an apothecary, brought an action against Rowley and Hogarth, as executors of a Mr. Sharpe, deceased, for medicines administered to, and attendance upon their testator; Hogarth, one of the executors, defended the action, and appeared by counsel; Rowley did not appear, and the plaintiff at law recovered a verdict, with 500*l.* damages; the plaintiff, who was residuary legatee in the testator's will, filed the present bill against Humpage, Rowley, and Hogarth, charging that the verdict had been recovered by collusion and fraud between Humpage and Rowley, and praying to be let in to try the merits of the case, and for an injunction to restrain further proceedings in consequence of the verdict. The answers were come in.

Mr. *Solicitor-General* moved for an injunction, stated it as a gross case of fraud and collusion, by which alone the verdict could have been obtained, and proposed to read affidavits to prove his case.

Mr. *Richards* opposed this, insisting that there was only one case in which affidavits could be read against the defendant's answer, in order to obtain an injunction; that was the case of waste, and to show this he referred to the case of *Lady Strathmore v. Bowes* (ante, vol. ii. p. 88). The answer must be taken *pro hac vice* to be true, and nothing can be read but out of the answer.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *Stanley*, on the part of the plaintiff, and Mr. *Mansfield*, on the part of Mr. Hogarth, contended, that the affidavits ought to be read: that this was different from the common case, where a person who brought an action at law was afterwards made

(1) This case seems to have been always considered as very questionable, and to have been held, for a long time past, of no authority. See in *Hanson v. Gardiner*, 7 Ves. 309; *Berkley v. Brymer*, 9 Ves. 356, and in Mr. Swanston's comprehensive and useful note to *Smythe v. Smythe*, 1 Swanst. Rep. 254, where most of the material authorities are classed, and to which the profession can be most readily referred. The reason why the above decision is peculiarly wrong seems, that such principle, although applicable in some instances to cases of waste and destruction, has no reference to cases of proceedings at law. See particularly *Norway v. Rowe*, 19 Ves. 144, &c.; *Smythe v. Smythe*, 1 Swanst. 252.

a defendant in equity; in which case, on application for an injunction after answer, nothing could be read but out of the answer: but in this case, a fraud was charged between Humpage and one of the executors, to defeat the justice of the case, under the form of a legal inquiry, and the trial at law was a part of the fraud charged. It is a bill by the residuary legatee, complaining of a fraud in the executor, by which his residuary fund will be diminished; and, therefore, [*464] rather resembles the case of waste, in which the affidavits *have been allowed to be read. They cited Mr. Cox's note of *Strathmore v. Bowes*, (2) 3 P. Wms. 255, a. (where other cases are cited, in which the same thing has been done), to show that it was Lord Kenyon's opinion that they ought to be read, and that he would have ordered them to be read if the parties had not consented. So in *Chamberlyne v. Dummer* (ante, vol. i. p. 166), the affidavits were read; and the same in a case of *Charlton v. Parnter*, (3) 26th March, 1753, relative to a partnership. (3) Also, in *Robinson v. Lord Byron* (vol. i. p. 588), where the bill was to restrain Lord Byron from letting a greater quantity of water than usual flow upon a mill, affidavits were read against the answer. *Cole v. Gibbs*, 3 P. Wms. 285, was the case of a patent invention, where affidavits were read against the answer. The plaintiff, in the present case, if he cannot have an injunction, will be driven to charge Rowley with a devastavit. If the money once gets into the hands of the plaintiff at law, the decree hereafter, in favor of the present plaintiff, may be useless. (3)

Mr. *Graham*, and Mr. *Richards*, for the defendants. There is nothing in this case to take it out of the general rule. The only cases where affidavits are permitted to be read, are cases of waste, or similar cases to waste, namely, where irreparable injury would be done if the Court did not interfere, as in the case of patent inventions. In the case of waste, the injunction is granted on proof of title, and on affidavit of waste; there the Court, having granted the injunction on affidavits, will, upon the showing cause, look back to the affidavits on which the rule was granted; but will it admit of affidavits being read against the answer? So in the case upon the partnership, the suggestion was that the partner was insolvent, and that irreparable damage would ensue if the Court did not interfere. This is an action by Humpage against the executors of Sharpe. Is there a pretence, that, if a verdict should go against them, there will be irreparable damage? It does not appear that they are insolvent. Is there anything like waste? If, on the hearing, they prove the collusion, they must bring back the money that has, against conscience, been recovered at law. In the cases of waste and patents, there could be no relief, if the injunction did not go.

Mr. Justice *Buller*. The objections against reading the affidavits [*465] are not entitled to any favor, it being only for delay; whether *the question is tried now on the affidavits, or, by-and-by, at the hearing of the cause, the difference is only the chance of the plaintiffs losing the money: but if, in the common case, the affidavits cannot be read, they must not in this. And it is said, that, in the common case, nothing can be read but what appears on the face of the answer; but,

(2) S. C. ante, 2 vol. 88, 89.

(3) It is to be observed, that a material mistake occurs in Mr. Vesey's statement of this case in the contemporary report (1 Ves. jun. 429); the name of it is *Charlton v. Poulter* (R. L. 1762, A. fol. 73, b.) The Editor examined the facts in Reg. Lib. and furnished Mr. Vesey with the correction, which is now inserted in that gentleman's 19 vol. p. 148, note.

certainly, there are cases where that rule does not prevail; waste is one of these, and the ground of the exception is, that an irreparable mischief would ensue; and that the Court will prevent that irreparable mischief by its interposition. The present case is very like that. Here is a demand of the specific thing—the assets of the testator. That is a difference between courts of law and of equity; courts of law only affect the person of the defendant, courts of equity bind the assets themselves. The plaintiff here says, the defendants are by collusion wasting the assets of their testator, to which he is entitled. That brings it within the case of waste. So in the case of patents, it will remain the same at the trial. It is a reason for going out of the common course, because the plaintiff would be injured by the exercise of the right in the mean time. In *Robinson v. Lord Byron*, the Court granted the injunction upon the same reason, on reading affidavits. But another reason the plaintiff proceeds upon, is fraud; and, in case of fraud, an immediate interference is necessary; and, therefore, it being such a case, the affidavits must be read. (a)

Upon reading the affidavits, and they making out a very strong case, Mr. Humpage, the plaintiff at law, being present, consented to a new trial. (4)

(4) An issue was directed, "*Quantum meruit*." — R. L.

(a) See *Eden on Injunct.* (2d edit.) 136; 1 *Smith, Ch. Pr.* (Am edit.) 596, and note; *Lane v. Williams*, 6 Ves. 798; 1 *Madd. Ch. Pr.* (4th Am. edit.) 136; *Smith v. Lowry*, 1 *John. Ch.* 320; *M'Vicar v. Wolcott*, 4 *John.* 510; *Hayes v. Ward*, 4 *John. Ch.* 123.

[In injunctions to stay proceedings at law, it is repugnant to the whole course of practice, to receive affidavits in contradiction to assertions positively made by the answer. But the Court has admitted affidavits to be read in support of allegations made by the bill, where those allegations related to acts of the parties, and the defendant, by his answer, neither admitted nor denied the truth of them; *Morgan v. Goode*, 3 *Meriv.* 10. So letters set forth by the bill, and not admitted by the answer, were permitted to be verified by affidavit; *Taggart v. Hewlett*, 1 *Meriv.* 499, and in *The Attorney-General v. Elliott*, 2 *Price*, 48, under very peculiar circumstances, an affidavit was permitted to be read, to supply certain omissions in the bill. As to admitting affidavits in cases of waste, in opposition to the answer, vide the Editor's note to *Lady Strathmore v. Bowes*, cit. sup. — *Eden*.]

WORLIDGE v. CHURCHILL and Others. [11th Feb.]

Mr. J. Buller for the Lord Chancellor.

(Reg. Lib. 1791. B. fol. 222.)

Testator leaves a residue in trust for four, with survivorship. Two die, the survived shares shall survive as well as the original share; [being the case of an aggregate fund.] (1)

EDWARD WORLIDGE, the plaintiff's father, seised of estates in fee-simple, and possessed of personal estate, made his will, dated 19th August, 1772, and thereby gave unto Mary Worlidge an annuity of 150*l.*, and also gave to the defendants, Churchill and others, all his real estates, and also all his personal estate, on trust to sell the same, and the moneys arising therefrom, after payment of his debts, and retaining so much as should be sufficient to purchase such annuity, to lay out the same *in government security, in their names, in trust, and for [*466]

(1) See the case of *Harman v. Dickinson*, and the note, as reported by the Editor from the Reg. book, ante, 1 vol. 91, and note the distinction with reference to the principal case, and that of *Ferguson v. Dunbar*, in Mr. Brown's note, postea, 469.

the benefit of Rosalba Worlidge, plaintiff, Edward Worlidge, William Worlidge, and John Worlidge, to be equally divided amongst them, on their attaining the ages of twenty-one years; but if any of them should happen to die before attaining such age of twenty-one years, then such deceased child's share to go to the survivors or survivor of them; and he directed the said trustees to apply the interest of such trust-money, during their minority, for and towards their maintenance and education; but if the interest should be more than sufficient for such purpose, then he directed the trustees to lay out the same for the said children's mutual benefit, and in case all the said four children should happen to die before attaining the age of twenty-one years, and leave Mary Worlidge living, then he directed the trustees to pay her the interest of such trust-money, from time to time as it should grow due, and after the decease of all, he gave and bequeathed the said trust-money to the children of his late uncle, Mr. Stephen [Landen], to be equally divided among them, share and share alike, with power to the trustees to put the sons apprentice, and provide apprentice-fees, and made the trustees executors.

Testator made two codicils, immaterial to the present question.

John, one of the children, died in the lifetime of the testator.

William Augustus (in the will, called William) died in February, 1783, an infant aged about seventeen, intestate and without issue; and the defendant, Townshend, having obtained letters of administration, was his personal representative.

Rosalba died in July, 1786, an infant about eighteen, but made a will disposing of such estate and effects, of what nature, &c., as she became entitled unto, and vested in her in consequence of the decease of her late brother, John William, in the lifetime of her father, and after the decease of her late brother, William Augustus Worlidge, by virtue of the will of said Edward Worlidge, or otherwise howsoever, "and also her estate and effects whatsoever which she might be possessed of or entitled unto, and which she had right to dispose of," and made the defendant, Porter, executor of such will.

[*467] *The plaintiff filed his bill against the executors, for an account, and prayed, *inter alia*, that the representatives of William Augustus, and Rosalba, might set forth their claims.

The defendant, Townshend, by his answer, submitted that he was entitled, as representative of William Augustus Worlidge, to such share as his intestate would have been entitled to.

The defendant, Porter, as executor of Rosalba, insisted that John having died in the life of the testator, one fourth part of the money arising from the sale of testator's estates, to which John would have been entitled had he survived testator and attained twenty-one years of age, upon decease of testator accrued to plaintiff, and said Rosalba and William Worlidge, and the interest therein became vested in them, immediately; and, upon the decease of said William, an infant under twenty-one, his share also in testator's estate, vested immediately in plaintiff and Rosalba, in equal proportions, and therefore claimed the same, subject to the trusts of her will.

The cause coming on to be heard (11th February, 1792) before Mr. Justice Buller, sitting for Lord Chancellor,

Mr. Solicitor-General, Mr. Mitford, and Mr. Richards (for the plaintiffs), argued, that although the general rule had been, that where there were not particular words used for the purpose, surviving shares would not survive again; but that, though the original shares should go over, those

which accrued by survivorship, would be vested interests in the children dying, and transmissible to their representatives; yet that the rule had been much blamed, and disapproved of by the Court; that in the case of *Pain v. Benson and Palmer*, 3 Atkyns, 78, Lord Hardwicke had availed himself of the particular circumstances of the case, to determine in contradiction to the rule. That the present Lord Chancellor, though he acknowledged the existence of the rule, expressed his disapprobation of it in the case *Ex parte West* (ante, vol. i. p. 575). There it was a gift to A. B. and C. of 1000*l.* each, at twenty-one, not a gift of 3000*l.* to be divided among them; A. died, and then B. died, the question was, whether the part of A.'s legacy which had survived to B. should survive again to C. or only B.'s original share so survived. Mr. Maddocks cited the case of *Rudge v. Barker*, Forrest. 124. Lord Chancellor *thought [*468] the word *share* would mean all the party took under the will, and would take in the survived as well as the original share: but did not care to overturn the decisions sitting in bankruptcy, where he could have no opportunity of reconsidering his opinion; at the same time saying, that if the parties would bring it before him in a more solemn way, he would give it more consideration. It is true that, in that case, a bill was filed, and set down before Lord Kenyon, who decreed that the surviving share did not survive; but that was because he did not see sufficient in the particular will before the Court, to vary from the general rule. But there, the legacies were three separate and distinct legacies, and the words were, "in case any of them should die," not, as in this case, one aggregate sum to be divided among three persons at twenty-one. The case of *Pain v. Benson* shows how ready Lord Hardwicke was to take the case out of the rule, and Lord Thurlow approved of his readiness so to do, though he did not think the circumstances of the case furnished such a distinction, upon the will before the Court. There can be very little doubt as to the testator's intention. It is a trust by sale of real and personal estate, to constitute an aggregate fund, which is given, in the entirety, to the trustees, and it is not to receive a divisible quality till the legatees attain twenty-one years of age; and if any of them die before, the share of such deceased child is to go to the survivors, the interest is to be applied for maintenance, and if it proved more than sufficient, the surplus was to be disposed of for the benefit of all. The clause giving it over in failure of all the children is decisive of the testator's sense, for nothing was to go over unless all died; it was clear, therefore, that if one died, he meant the others to take the whole, and that if all but one died, the whole should go to that one survivor. Another circumstance in this case is, that one of the children died in the life of the testator, and wherever a legacy is given to persons with benefit of survivorship, this Court has considered it as a remainder. The old rule seems to have been founded on the case of *Woodward v. Glassbrooke*, 2 Vern. 388, which went on the strictness with which devises of real property are considered; but even there if there had been additional words, that if all died, it should go to A. they would have raised a different construction. But what furnishes a distinction in this case, is, that in almost all the decided cases the legacies were distinct; that was the case in *Perkins v. Micklethwaite*, 1 Wms. 274. In *Rudge v. Barker*, Cases Temp. Talb. 124, in *Barnes v. *Ballard*, [*469] cited 3 Atk. 79, and *Scoolding v. Green*, Prec. Ch. 37.

Mr. *Schwyn*, and Mr. *Jones*, for the defendant, Porter, the executor of *Rosalba*.

Rosalba gave all that accrued to her by survivorship to the defendant

Porter; she claimed one third of the share of John, who died in the lifetime of the testator. It appears by *Willing v. Baine*, 3 P. Wms. 113, that his legacy was vested: in that case, two cases are cited from Vernon that prove the same position.

Mr. Justice *Buller*. No. John could take no share, the will must stand as divided among three.

Mr. *Selwyn*, and Mr. *Jones*. If she could not claim any share from John, she claimed one half of the share of William, with the plaintiff. That was an accumulated share, and, according to the cases, could not survive over again. It is fully decided in *Perkins v. Micklethwaite*, that in these cases the surviving portion is a vested interest in the surviving child; and, in this case, there are no words to create a joint-tenancy. It is the well-known practice of skilful conveyancers to introduce words to make such interests survive again; which shows their opinion, that, without such express words, they would not do so; and it appears from the case in 3 Atkyns, that the survived share has always been considered as being in the nature of a new legacy. On the petition *Ex parte West*, Lord Thurlow, though he was sitting in bankruptcy, gave the subject great consideration, and determined that the survived share could not survive; and Lord Kenyon, when that case came before him, said it would be too much to extend the words, by mere conjecture, beyond the

[*470] common meaning. In *Ferguson v. Dunbar*,† 7th May, 1781,* Lord Chancellor had decided the same thing. But it is said, there is a difference between this case and that of distinct legacies. We never heard of such a distinction; if there be, the words here are such, as to make the legatees tenants in common, which makes it the same thing as if they were distinct legacies. In this case also the interest is appointed to be applied to the maintenance and education of the children, that circumstance vests the legacies, *Fonnercau v. Fonnercau*, 3 Atk. 645. As to the last clause, that does not *ex vi termini* apply to the whole, but to the last unvested share.

Mr. Justice *Buller*. There are cases in which the Court finds that, in its decisions, it has not followed the intent of testators, as in the case where freehold property is given to the devisee generally, without words

† *Ferguson v. Dunbar* and Others, 7th May, 1781.(†) William Dunbar devised to plaintiff, his executor, so much of his personal estate as would purchase an annual sum of 550*l.*, which he gave to his wife for her life; and he directed the principal, after her decease, to be paid to his children; that is to say, one half to his son George, and the other half to his daughters, Elizabeth and Charlotte, equally, if living at the death of their mother; and if any of them should die in the lifetime of the mother, leaving issue, he gave that share to the issue of such child or children equally, at the age of twenty-one years, or day of marriage; but if any of them should die before the age of twenty-one years, without issue, he gave that share to the survivors; and if all of them should die without leaving children, then he directed the same to fall into the residue of his personal estate. He gave his daughters 8000*l.* each, and appointed his son residuary legatee. Charlotte married Richard Mitchell; afterwards the mother died; and Charlotte died, leaving two daughters by Richard Mitchell, who were defendants to the bill, which was brought by the executor to have the trusts of the will carried into execution, and to be discharged on account of his great age. After the death of Charlotte, Elizabeth died under age, and without issue. The question was, whether the children of Charlotte were entitled to any part of the share of Elizabeth.

Lord Chancellor said, this was one of those cases in which he had the mortification to see, that what was most probably the testator's intention could not be executed for want of his having been properly advised, and having sufficiently explained himself; that he thought the testator meant the children should take the share which would have accrued to the parent if living; but not having said so, but limited such share to the survivors or survivor, he must declare George, as the only surviving child, entitled to the whole of Elizabeth's share; and decreed accordingly.

(†) There is no entry in Reg. Lib. upon this occasion. Upon this cited case, vide per M. R. in *Milson v. Audray*, 5 Ves. 469, and the Editor's note to *Harman v. Dickenson*, ante, 1 vol. 91.

of limitation, the Court will not vary from the legal rule ; but if it is clear the testator meant to give the devisee an absolute interest, the Court will raise a fee.

This is a case of the same kind ; the Court has thought itself bound to decide according to the rule of law, though the construction was against the intention of the testator, as it was in the case *Ex parte West*, where the gift was of a distinct legacy.

It is impossible to express a greater dislike to a rule, than Lord Thurlow expressed in that case ; and he ended with an indication to the parties to bring the case before him again. He was of the same opinion when he decided *Ferguson v. Dunbar* ; he was desirous to catch hold of the circumstance, to take the case out of the rule.

*The language that has been used on these subjects, is not easy [*471] to account for ; in *Rudge v. Barker*, it is said by the Master of Rolls, that, whatever the intention of the testator might be, the Court must judge on the words of the will. That expression is not accurate ; the Court must go upon the words of the will, to discover the testator's intention ; but, if the intention is apparent, it must be pursued.

The distinction as to their being distinct legacies is rather a nice one, but not so nice as not to be regarded ; *Rudge v. Barker*, it is said, " had they not been distinct legatees, it might have been another question ; " that shows the rule was not thought to apply to an aggregate fund.

If this were *res nova*, and there was a limitation to " survivors and survivor," no one could collect the intent to be otherwise than that the survivor should take the whole ; but if the case had rested there, I should have thought it difficult to get over the objections.

But the strong part of the present case is, the testator's intention to keep it as an aggregate fund. He has made use, in two different parts of the will, of the words trust-money ; that expression does not apply to the share of each child, but to the whole fund in the trustee's hands, and takes in the whole fund that is to be distributed under the will. The second place where he uses the expression trust-money, is in the gift over to the children of his uncle [Landen] ; and though the expressions the whole, or all, are not used, the words trust-money are tantamount to them. The plaintiff therefore is entitled to the whole fund. (a)

And all the parties must have their costs paid out of it.

(a) See 2 Williams, Ex. Pt. 3, B. 3, ch. 2, § 5, p. 763, 764 ; *Barker v. Lea*, 1 Turn. & Russ. 415 ; *Crowder v. Stone*, 3 Russ. 217 ; *McKay v. Hendon*, 3 Murph. 21 ; *Ex parte West*, 1 Bro. C. C. 575, and notes.

MAY v. WOOD. Rolls, [18th] (2) 23d Feb.

(Reg. Lib. 1791. B. fol. 156.)

A legacy ["given"] to daughters equally to be divided between them, [with a devise also thus: "and all my estate at St. O., to be equally divided between them,"] when they arrive at twenty-four years of age, [the legacy held to be] vested immediately, and only the time of payment postponed. (1)
 The words "and also" may so far disunite two clauses of a sentence as to give a different construction to the same words.

THE testator gave, by his will, as follows: "I give to my daughters, Mary and Margaret, the sum of 3000*l.* 5 per cent. navy annuities, [*472] and all the dividends and proceeds arising *therefrom, to be equally divided between them, and all my estate at St. Osyth, to be equally divided between them when they shall arrive at twenty-four years of age; and [also] (2) I give to my sons, Richard and John, all the residue and remainder of my property and estate, bond-debts, mortgages, annuities, &c., to be mutually and equally enjoyed by them; and he appointed R. Sterling, ——— Talman, and Thomas Wood, executors of his will.

One of the testator's daughters married the plaintiff May, and died after she attained twenty-one, but before she arrived at twenty-four years of age; the period mentioned in the above clause.

The bill was filed by the plaintiff May, against Thomas Wood, the surviving executor, and other parties, residuary legatees, insisting that a moiety of the said 3000*l.* was a vested legacy, and that, notwithstanding his wife had died under twenty-four years of age, it was transmissible to him as her representative.

Master of the Rolls. (2) The question arises upon the clause in the testator's will, containing the gift of the 3000*l.* navy annuities, to his daughters Mary and Margaret. I must confess, that I have never entertained a doubt, as to the point, conceiving it to be perfectly settled in respect to

(1) See 1 Roper on Legacies, 151, et seq. In this case the gift of each benefit was considered as entirely distinct from the period of division and payment, or entering into possession.

(2) The Editor having been favored with Sir J. Simeon's notes of the argument, and of the M. R.'s observations upon his first impression of the case, a few days previously to the period of this report (viz. Feb. 18th), thinks it material to insert them:—

Mitford and Stanley contended, nothing vested until the daughter claiming attained twenty-four; for that the words, "when they shall arrive, &c." are coupled with the first member of the sentence by the words "*and also*," and are as much to be applied to the personal bequest as to the devise of the lands; that the legal effect of the words, *to be equally divided*, was to make a tenancy in common; therefore it was the same as if he had devised to them as tenants in common, and also the land to them as tenants in common, at the age of twenty-four; and said, that if the words were, *subject to debts*, instead of, *at the age, &c.*, the Court would subject both funds.

Lloyd and Pemberton, contra.—The first clause is a complete vesting clause as to the personal only, the actual possession is suspended until twenty-one. That if there was any doubt upon the words as to that, the gift of the dividends would make it clear; for no contingent words make a difference, if interest be given in the mean time. And if nothing did vest in either until she attained twenty-four, it was not clear, that there might not be survivorship between themselves; but that the words, "*and also*," though strictly conjunctive, showed he had completely spoken the whole of his intention respecting the personal bequests, and was taking up a new devise of another subject; and the repetition of the words, *equally to be divided, &c.*, are unnecessary, unless used for the purpose of coupling it with the following words, which, in plain construction, ought to be applied only to the latter member of the sentence.

Arden, M. R., thought the plaintiff was right in both points, and though, without the repetition argued upon, the last words, "*when they shall arrive*," would depend upon and apply equally to both members of the sentence that precede (and the more so, as the word "*give*," governs and connects both members), yet he thought the repetition disconnected the two members, so far as to make the words "*when they*," &c., apply only to the latter member; but took time till Monday.

principle, as well as construction; the only reason for deferring my judgment was, for the purpose of looking into the case of *Love v. L'Estrange*, 3 Brown, Parl. Cas. 337 [5 vol. 59, octavo ed.], cited in *Monkhouse v. Holme* (ante, vol. i. 298), which comprehends all the authorities upon this point, as to pecuniary legacies, which is adverted to by Lord Loughborough, as having been determined upon the ground of its being a residue. (3) One does not know upon what ground the judgment of the Lords might be founded, but upon the statement of the case, it does not seem to warrant that observation; it not being, as I can discover, insisted upon by counsel on either side, in the case stated by them. (3) So that it may be considered as a determination upon a general pecuniary legacy, and to fall within the reasoning of the authorities upon this subject. It has been contended, upon the part of the plaintiffs, that, according to the rule established in all former cases, this legacy must be considered as vesting *in præsentis*; and the period of twenty-four years annexed to it, is not a condition, but the time when *the party should be put into [*473] complete possession. All the cases establish this principle, that where the time is mentioned, as referring to the legacy itself, unless it appears to have been fixed by the testator as absolutely necessary to have arrived before any part of his bounty can attach to the legatee, the legacy attaches immediately, and the time of payment is merely postponed, not being annexed to the substance of the gift; but if it appears that the testator intended it as a condition precedent, upon which the legacy must take place, then, if such condition or contingency does not happen, the gift never arises. It has, therefore, been insisted by the defendant's counsel, that the word *when*, must be considered synonymous to *if*; it is universally so, where the word *if* is used, as denoting a condition annexed, and therefore in such a case a legacy cannot take place. Here the words are, to be equally divided when they shall arrive at twenty-four years of age; the latter words relate to the whole of the preceding sentence, and it is not for me to consider, whether the words "to be equally divided" make any difference, and I do decide this point without any reference to those words. *Atkins v. Hiccocks*, 1 Atk. 500, has been cited upon the part of the defendant; and, from that authority, it seems clear, that if it had not been for the circumstance of its being payable at the day of marriage (but at any other time) Lord Hardwicke would have deemed it, merely, as a postponing the payment of the legacy; but he considered the period of marriage as the essential requisite, and the very consideration for which the legacy was given; and as that time, namely, the day of marriage, never arrived, his Lordship held it could not take effect. As to *Onslow v. South*, Eq. Ab. 295, there the words annexed the time to the substance of the legacy, being at twenty-one; and therefore the gifts never arose, until the time actually arrived; and the word *now* was much relied upon; but surely it could not amount to anything more than to describe the identity of the person. It has been argued for the defendant, that the testator could never be said to give the legacy until the time actually came when he declares that the gift should take place. These have been the cases relied upon; and it has been also contended, that, according to the true construction of this clause, the word *when* must be synonymous to *if*, and consequently that the legacy has never vested. Has the Court ever adopted such a construction? On the contrary, (4) all the cases, for full

(3) But see per M. R. in *Booth v. Booth*, 4 Ves. 408, et per Sir W. Grant, M. R. in *Hanson v. Graham*, 6 Ves. 248.

(4) See the next note, as to incorrectness of this part of the report.

[*474] half a *century, upon pecuniary legacies, have determined that word, not as denoting a condition precedent, but, only marking the period when the party shall have the full benefit of the gift, except something appears upon the face of the will, to show that his bounty should not take place, unless the time actually arrived; (5) and not where he has, merely, used the word *when* for the sole purpose of postponing the time of payment. (6)(a) *Roden v. Smith*, Amb. 588, has been cited for the plaintiff, which recognizes the general principle; but, there, the question was, as to the payment of the legacy to the legatee's administrator, whether he should receive it immediately, or wait till it would have been payable to the party himself. The Court held, that he could not be in a better situation than the legatee himself. As to *Love v. L'Estrange*, which I have before adverted to, I cannot approve of any distinction between a residue and a pecuniary legacy; (7) the word *when* would apply equally to both cases, and therefore that case must be analogous to the present. A very strong authority has also been cited, as to the construction of the word *when* in respect of *realty*, from 3 Term Rep. 41, where Lord Kenyon construed this word in the same manner. (b)

Therefore, I am of opinion, that, according to the true rule of construction, this word cannot be otherwise considered, than as denoting the period of payment, and must not be deemed as a condition precedent, upon which a legacy was to vest, but merely postponing the payment of this 3000*l.* with the dividends thereon, till twenty-four, (c) and declare, that the plaintiff, as the administrator of his late wife, is entitled to a moiety of

(5) Sir W. Grant, M. R., speaking of the above proposition, in his elaborate and learned judgment, in *Hanson v. Graham*, 6 Ves. 243, 249, states his doubt as to the correctness of this part of the report. His Honor there says, "considering the well-known diligence of the late M. R. in examining cases, and his uncommon accuracy in stating the result of them, he would hardly have drawn this conclusion from an examination of the cases. No case has determined that the word "*when*," as referred to a period of life, standing by itself, and unqualified by any words or circumstances, has been ever held to denote merely the time at which it is to take effect in possession. Standing by itself, so unqualified and uncontrolled, it is a word of condition; denoting the time when the gift is to take effect in substance. That this is so, is evident upon more general principles; for it is just the same, speaking of an uncertain event, whether you say 'when,' or 'if' it shall happen. Until it happens, that which is grounded upon it cannot take place." His Honor then illustrates this from the civil law.

(6) Sir W. Grant (*ubi supra*, p. 249), after alluding again to the incorrectness of the report as above, and quoting this particular paragraph, says, "If the M. R. meant to qualify his former position, that I admit, &c. But it is evident, that this is inaccurately taken; for the two parts of the proposition do not accord. First, it is laid down generally, that it requires words to show "when" does operate conditionally. In the latter part, it is stated, that if it appear "when" is used only for postponing payment, it shall not operate farther. Nothing can be clearer than that."

(7) Sir P. Arden, M. R., alluding to this passage, with reference to *Love v. L'Estrange*, says, "I see, in *May v. Wood*, I stated the fact, that it was not insisted on, and that I did not see any difference between the cases of a legacy, and a residue. If I did say so, I spoke with too much latitude; for I then thought, and I now think, there is a distinction; though in that case it made no difference; the words being so like those in *Doe v. Lea*, and *Goodtitle v. Whitty*." See in *Booth v. Booth*, 4 Ves. 408.

(a) See *Branstrom v. Wilkinson*, 7 Ves. 421; *Lane v. Goudge*, 9 Ves. 225; 2 *Williams*, Ex. Pt. 3, B. 3, ch. 2, § 5, p. 770, et seq.; *Ram on Assets*, ch. 6, § 14, p. 125, et seq.

(b) To the several cases upon real property, from *Boraston's case*, 3 Rep. 19, down to *Goodtitle v. Whitty*, 1 Burr. 223, and *Doe v. Lea*, 3 T. R. 41, which are all collected in *Fearn v. C. R.* 241, et seq., in which words apparently importing a contingency have been held not to amount to a condition precedent, are to be added *Bromfield v. Crowther*, 1 N. R. 313, afterwards affirmed in the House of Lords; *Doe v. Moore*, 14 East, 601; *Doe v. Nowell*, 1 M. & S. 327. In one of those cases it was observed by Lord Ellenborough (14 East, 604), that the decisions upon legacies, being founded in a great measure upon the doctrine of the civil law, were not applicable to devises of real estates. — *Eden*.

(c) *Dawson v. Killet*, 1 Bro. C. C. 123, note (a), and cases cited; *Barnes v. Allen*, 1 Bro. C. C. 182, note (b); *Caldwell v. Kinhead*, 1 B. Monroe, 231; *Lister v. Bradley*, 1 Hare, 10; *Ferson v. Dodge*, 23 Pick. 287; *Clapp v. Stoughton*, 10 Pick. 463.

the 3000*l.* 5 per cent. navy annuities. The word *dividends* having been added by the testator, puts it out of question, whether he shall take it *now* or *hereafter*, when his wife would have arrived at twenty-four, otherwise *Roden v. Smith* must have guided the Court upon this point, and I could not have said, that the administrator of the wife should have been put into a better situation than the residuary legatee, had not the word *dividends* been added; and therefore also declare the plaintiff to be entitled to all dividends due thereon, with costs out of the general fund.

*SCOTT v NESBIT. Lincoln's-Inn-Hall, 27th Feb. [*475]

The bidding on a lot sold in this Court, may be opened upon a proper offer, even a second time, if the Master's report has not been confirmed; but shall not be opened at all, after confirmation. (1)

A MOTION was made, to open the bidding on the sale of a lot in this cause, the bidding upon which had been opened before. The offer of advance was considerable, (a) and the report of the purchaser had not been confirmed. Mr. *Mitford* opposed the motion, on the ground that it was unusual to open a bidding a second time, but Lord CHANCELLOR did not conceive that to be an objection, as he saw no reason why it should not be opened a second time as well as a first; and granted the motion. (b)

But with respect to another lot, although this was the first application, and the sum offered considerable (a seventh part of the purchase-money), where the Master's report of the purchaser had been confirmed, his Lordship refused the motion.

(1) See *Wren v. Kirton*, 8 Ves. 502; *Morrice v. Bishop of Durham*, 11 Ves. 57; *White v. Wilson*, 14 Ves. 151, et seq., and the notes to *Prideaux v. Prideaux*, antea, 1 vol. 237. { *Gower v. Gower*, 2 Eden, 378; 1 Sugden, Vend. & Purch. (6th Am. edit.) 86, [121.] et seq., ch. 5, § 3, and cases in notes; *Aubrey v. Denny*, 2 Moll. 508; 1 Barbour, Ch. Pr. B. 2, ch. 3, p. 537, 538; 2 Madd. Ch. Pr. (4th Am. edit.) 503; *Mayne v. Macartney*, 2 Irish Eq. 324; *O'Connor v. Richards*, Sausse & S. 246.

(a) See *Digby v. Browne*, 1 Irish Eq. 377; *Goodall v. Pickford*, 6 Sim. 379; *Ward v. Cooke*, 9 Sim. 87.

(b) The English practice in relation to opening biddings upon a Master's sale is not recognised in New York, North Carolina, Maryland, or New Jersey, nor the English practice adopted. *Gardiner v. Schermerhorn*, 1 Clarke, 101; *Andrews v. Scotton*, 2 Bland. 629; *Young v. Seague*, 1 Bai. Eq. 14; *Seaman v. Riggins*, 1 Green, Ch. 214.

HODGSON v. DAND. Lincoln's-Inn-Hall, 1st March.

(Reg. Lib. 1791. A. fol. 732.)

[Bill to set aside a mortgage as fraudulent (having been made on the eve of a bankruptcy) dismissed with costs from the coming in of the answer, upon the ground of the answer having furnished a sufficient defence to an action at law upon the security.] (1)

A MORTGAGE was made just before a bankruptcy, in which the nominal consideration was 200*l.* Upon a bill to set it aside as fraudulent, the de-

(1) The doctrine in this case seems very questionable; for Lord Eldon C. seems invariably to have held, that it has ever been part of the ancient and sound jurisdiction of courts of equity to order conveyances, bonds, or other securities to be delivered up, notwithstanding the party might be able to defend himself against an action at law upon such instrument.

fendants admitted in their answers (and evidence had been admitted at the hearing to show) that the nominal consideration was not the real one, nor any money paid at the time, but at the same time stating that the mortgage was given as a security for an old *bonâ fide* debt.

Lord CHANCELLOR dismissed the bill with costs, from the coming in of the answer; saying that, although the plaintiff might have good reason for filing the bill, for a discovery; (2) when he had that, and found it a good defence, he ought not to have gone on. (a)

Lord Eldon, indeed, puts the very case above in question of a mortgage, in *Jervis v. White*, 7 Ves. 415, stating, that "the party is not relieved from all danger unless the instrument is delivered up." The danger from such "a cloud upon the title" is evident from the consideration, that the person who is in possession of a security fraudulently obtained (without any badge of fraud upon the face of it), may assign or may pledge it to innocent third persons, capable of being considered as *bonâ fide* purchasers, for a valuable consideration, without notice; and whose claims will, at all events, expose the other party to great contest, embarrassment, expense, and a multiplicity of suits. All this may result, without the individual who obtained such a voidable instrument ever himself bringing an action upon it, to which, as Lord Thurlow says, the party might make "a good defence." That Lord Thurlow never meant to lay down as a general position, that equity would not order an instrument to be delivered up, merely because (under some circumstances), a party might have a good defence to them at law, seems obvious, both from what Lord Eldon C. says with reference to the ancient practice of the Court, and Lord Thurlow's general sentiments, 7 Ves. 19, 20, 414, &c., 14 Ves. 28, &c.; but also from the very words of Lord Thurlow himself, as taken down by Mr. Cox, in the case of *Thrale v. Ross*, and inserted in the Editor's note (3), ante, p. 57. His Lordship there says, "I do not mean to say, that this Court will not set aside a bond on account of a corrupt consideration, only because it may be made the subject of a defence at law: by no means, for I think otherwise. But, in this case, I think the question may as well be left to a trial at law." See also *Hanington v. Duchatel*, ante, 1 vol. 124, 125, with the Editor's notes, and the Editor's notes to *Ryan v. Mackmath*, ante, 15.

(2) See *Hindman v. Taylor*, ante, 2 vol. 7, et seq., and notes; especially the Lord Chancellor's judgment, pp. 10, 11; Et vide notes to *Ryan v. Mackmath*, ante, 15, 18, and notes.

(a) But see *Hamilton v. Cummings*, 1 John, Ch. 520 - 524; 2 Story, Eq. Jur. ch. 17, § 698, 699, 700, 700 a, 701, 702, and notes and cases cited. See also note (a) to *Ryan v. Mackmath*, ante, 18.

[*476] *STOREY v. HIGGINS. Lincoln's-Inn-Hall, 2d March.

(No entry.)

Ne exeat regno refused against the agent of a surviving executor, having in his possession a bond which was the security for a residue to which plaintiff was entitled. (1)

BILL by two residuary legatees against a surviving executor.

Mr. *Pemberton* moved for a *ne exeat regno* against John Higgins, the agent of the person claiming to be the representative of the deceased executor — Higgins, on the ground that he had got into his possession a bond from one *Palmer* to the deceased executor for 300 and odd pounds, which was the security for the residue; and the affidavit stated that the deceased executor paid one of the plaintiffs regularly the interest, as his share of the residue. No personal representative of the deceased executor was before the Court, there being a contest as to the representation in the ecclesiastical court. The affidavit stated a declaration, that he was going abroad.

It had been moved at the Rolls, where his Honor was inclined to grant the writ, but was at a loss how to indorse it, as Higgins could not properly be said to be indebted to the plaintiff.

(1) See *Beames*, on *Ne Exeat*, 37, and the note; *Ray v. Fenwick*, ante, 25; Et vide 1 *Ball & Beatt.* 337.

LORD CHANCELLOR said their ground was, that Higgins was in possession of a valuable bond, which was the security for the plaintiff's share of the residue. If Palmer, the obligor, was the party, he would be indebted: but it was difficult to say Higgins was. That if he had possession of notes, the writ might be indorsed for the value; but that if he carried away the bonds, it would not destroy the debt, but the plaintiffs might still recover. The bill must be amended by making Palmer a defendant.

Refused the motion. (a)

(a) See 1 Smith, Ch. Pr. (Am. edit.) 578, 579; Atkinson v. Leonard, ante, 218, and notes to that case; Cock v. Ravis, 6 Ves. 283.

PATRICK and Another v. HARRISON and ANOTHER.

Lincoln's-Inn-Hall, 2d, 5th March.

(Reg. Lib. 1791. B. fol. 119.)

Injunction to restrain defendants from negotiating a bill of exchange given for goods not delivered, issued on certificate of bill filed, (1) and to be served with the subpoena. (2)

MR. STANLEY moved for an injunction to restrain the defendants from negotiating or parting with a bill of exchange, accepted by the plaintiffs, on the following circumstances:

*The plaintiffs, by their broker, bought of the defendants a parcel [*477] of cotton wool. The custom of the trade is, to allow the purchaser 14 days from the time of the contract to take away the goods, which are delivered on the purchaser's acceptance of bills of exchange at three months (or upon certain allowances, for ready money). On the 19th December last, being 14 days from date of the contract, defendants sent an account of the cotton, amounting in the whole to 1150*l.* 0*s.* 3*d.*, for which the plaintiffs accepted a bill drawn at three months, and delivered it to the defendants, in confidence that the lots of cotton would have been immediately delivered to them or their order; but notwithstanding application from the plaintiffs for that purpose, the defendants declined delivering either the cotton, or to redeliver the bill of exchange.

The bill had been filed two days (as appeared by a certificate) before the motion made, but the subpoena had not been served.

Mr. Stanley submitted to the Court, that this was within the reason of those cases, in which injunctions have gone immediately upon filing the bill; namely, where irreparable injury may be done by the defendant's doing the act enjoined; as in the cases of waste, of pirating books, or infringing patents. That here, in case the defendants should negotiate the bill, the plaintiffs could make no defence against it in the hands of a *bonâ fide* holder, and therefore they would be irreparably injured by its being so negotiated.

LORD CHANCELLOR said, that he could not reconcile the issuing the injunction where no subpoena was served. That in the case of waste, the

(1) and (2) S. P. Blackwood's case, 3 Anstr. 861; and see Smith v. Aykwell, there cited, 3 Atk. 566, and Ambler, 66, with the prior instances there mentioned. See also Jervis v. White, 7 Ves. 413, 416.

(2) This is now the common course; although the Court generally directs that, when the service takes place, the party shall be apprized that he is at liberty to apply for a dissolution of the injunction, as he may be advised. See further the next note.

injunction issued, because the subpœna was filed. His Lordship at first declined making any order.

But upon its being mentioned a few days after, his Lordship ordered the injunction to go, (3) and the subpœna to be served at the same time with it. (4) (a)

(3) "From negotiating or parting with the said bill of exchange, or bringing any action thereon, until answer and further order." — R. L.

(4) See the preceding references. Lord Eldon C. also held, that the same principle prevails where a plaintiff, having obtained the common injunction to stay proceedings at law upon the instrument in question, moves upon affidavit to extend the injunction to prevent its negotiation. Previous notice of such application is unnecessary, since the very intimation might produce the mischief apprehended, and the instrument get into the hands of a *bona fide* holder for valuable consideration. Per Lord Eldon C., 7th July, 1802. Editor's MSS.

(a) See Atty. Genl. v. Nichol, 16 Ves. 338; Eden on Injunct. (2d ed.) 379, 342; 2 Madd. Ch. Pr. (4th Am. ed.) 217.

It is irregular to serve the defendant with an injunction, without taking out and serving him with a subpœna to appear and answer. 1 Barbour, Ch. Pr. B. 3, ch. 5, § 7, p. 631; Parker v. Williams, 4 Paige, 439; Seebor v. Hess, 5 Paige, 85; Atty. Genl. v. Nichol, 16 Ves. 338.

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*LYSTER v. DOLLAND.

[Vide S. C. 1 Ves. jun. 431.] Lincoln's-Inn-Hall, 5th, 6th March.

(Reg. Lib. 1791. B. fol. 144.)

An equity of redemption cannot be taken in execution. (1)

WILLIAM LYSTER, since deceased, and Thomas Lyster, the plaintiff, being possessed of leases of three houses in Charlotte street, Bloomsbury, for the remainder of a term of eighty-three years, from the Duke of Bedford (being building leases), mortgaged the same to the defendant Dolland, by an assignment of 23d December, 1769, for the sum of 400*l.* upon the security of each house, and gave three several bonds as a further security for the said mortgage-money.

In Michaelmas term, 1780, defendant Dolland filed a bill in this Court to foreclose the equity of redemption of the mortgaged premises, and the defendants thereto put in their answer, and prayed time to redeem the same; but the defendant, Dolland, did not proceed in the cause; but in the same Michaelmas term commenced actions of debt on the bond against William Lyster and the plaintiff, and proceeded to judgment therein, and brought actions in ejectment to recover possession of the mortgaged premises, and obtained judgment in such actions.

In May, 1781, William Lyster died, having made his will, dated 4th June, 1776, whereby he took notice that several building leases had been obtained in the joint names of himself and the plaintiff, Thomas Lyster, but that the plaintiff, Thomas, had no beneficial interest therein; he gave all his leasehold estates to the plaintiff, Robinson, in trust to sell, and after payment of the sums of money due thereon, and other his debts, he directed the surplus to be divided among the plaintiffs, Sarah Lyster, Thomas Lyster, and Ann Tatischeff, his three children, and appointed the plaintiff, Robinson, executor of his will; and by a codicil he appointed the plaintiff, Sarah Lyster, joint executrix with Robinson, who alone proved the will.

The defendant Dolland, in 1781, advertised that the three leasehold

(1) See accordingly Scott v. Scholey, and Metcalfe v. Scholey, 8 East, 467, and 2 Bos. & Pull. New Rep. C. P. 461.

houses would be sold by the sheriff of Middlesex, under the judgments obtained upon the bonds; and the premises were accordingly put up to sale, and sold for less than the mortgage-money, to the defendant, Fairbone, and had been conveyed to him; and it was admitted that he purchased the same as a trustee for the defendant Dolland.

*The bill prayed that the defendant might account to the plain- [*479] tiffs for the rents, &c., and that the plaintiffs might be at liberty to redeem.

The defendant Dolland swore by his answer, that the sale was with the privity and consent of the plaintiff, Thomas Lyster (who was since dead), to whom the equitable title in the premises survived on the death of William Lyster, and therefore insisted that the plaintiffs are not entitled to redeem.

It was argued on the 5th March, when

Mr. *Mitford*, on behalf of the plaintiffs, contended, that they have now a right to redeem. That the execution being illegal, and an absolute nullity, the defendant's title is the same as if it had been never taken out, and Dolland has the legal title by ejectment, subject to the same equity of redemption that it was before. It is admitted that the profits of the sale are 300*l.* less than the sum for which the executions were taken out, so that he is really in possession as a mortgagee.

Mr. *Lloyd*, and Mr. *Scafe*, for the defendants.

The Court will permit a mortgagee to take every remedy he can against the mortgaged premises, and the plaintiffs are not now entitled to redeem. The Court will not determine that this is not a saleable interest, or that it is such an interest as cannot be taken in execution. It has been held that equitable interests may be taken in execution. Under the circumstances of this case, there is no reason to permit a redemption. It is not like the case where the estate of the mortgagee has never become absolute. In *Endsworth v. Griffiths*, 2 Eq. Cas. Abr. 595, also 15 Viner, 468, pl. 8 (and in 1 Bro. P. C. 149), under similar circumstances redemption was refused. Dolland having got possession of the estate by the sheriff's sale, was the same thing as if Lyster had conveyed to him. Here the property was mortgaged by the two Lysters, the survivor permitted and acquiesced in the sale.

Mr. *Mitford*, in reply, said, where an estate is purchased by partners in trade, as in this case, for the purposes of a trade, though it is a joint interest, the equitable interest will soon survive *to the representa- [*480] tives of one of the parties first dying, and that the executors of William Lyster had not joined in any of the acts, though Thomas Lyster had done so.

LORD CHANCELLOR said, the prayer of the bill was sufficient to force his opinion, whether the holder of such an interest is entitled to take this sort of property in execution. Where the equitable interest is taken in execution, and sold for a gross sum of money, it is impossible to distinguish what is given for the equity of redemption, and what for the term. Where two persons take a farm, it is a joint adventure; so where two are concerned together in a trade; there the interest in the equity will turn round the joint estate; but the Court has been of opinion, that the interest of the joint representatives was subject to the adventure. If parties in trade purchase lands for the purposes of their trade, those purposes will affect the interest of the parties in the lands. (2) (a)

(2) This question is yet, it seems, undecided. See the Editor's note to *Thornton v. Dixon*, ante, 199. { But see note (a) below. }

(a) The general principle now declared in the English law, is, that real estate acquired for

In the present case, if the defendant had contracted with the plaintiff to give him the advantage of the sale, that contract would have bound him; but it strikes me as impossible for the mortgagee to take the equity of redemption in execution, and sell it, throwing in his own title. This is a case of the first impression. Supposing a case of equity of redemption to be extendible, I do not know what effect it might have if the equity alone was sold; but it seems more difficult to admit it where the mortgagee throws in his own estate, so that it is impossible to distinguish how far the debt is extinguished by the sale. (b)

It stood over, and came on again on the 6th of March (when the reporter was absent), when (as he has been informed) (3) Lord Chancellor decreed in favor of the plaintiffs, that they be let in to redeem, (3) on the ground that an equity of redemption was not liable to be taken in execution, under the stat. 29 Car. 2, c. 3, and his Lordship desired that might be taken notice of as the ground of the judgment. (c)

(3) This is correct; agreeing with Reg. Lib.

the purpose of a trading concern, is to be considered as partnership property, and to be first applied in satisfaction of the demands of the partnership. *Fereday v. Wightwick*, 1 Russ. & My. 45. It is taken to be personal estate, and retains that character, as between the real and personal representatives of a deceased partner. *Phillips v. Phillips*, 1 My. & Keen, 649; *Broom v. Broom*, 3 My. & Keen, 443; *Morris v. Kearsley*, 3 Young. & Coll. 139; 3 Kent (5th ed.), 37, 38, 39, and notes. See further upon this subject, for the doctrines of the English and American law, Collyer on Partnership, B. 2, ch. 1, § 1, p. 69, et seq., and cases cited in note (1) to p. 69. See also the cases cited in note (a) to *Thornton v. Dixon*, ante, 200; 1 Story, Eq. Jur. ch. 15, § 674; Story, Partnership, ch. 6, § 93, and note at the end of the section; *Burnside v. Merrick*, 4 Metcalf, 537; Rand's note to *Goodwin v. Richardson*, 11 Mass. 476; *Hoxie v. Carr*, 1 Sumner, 181-186; *Blake v. Nutter*, 19 Maine, 16.

(b) A mortgagee cannot cause a sale to be made of the equity of redemption for the purpose of paying or extinguishing the debt secured by the mortgage. *Atkins v. Sawyer*, 1 Pick. 351; *Goring v. Shreeve*, 7 Dana, 66.

But see *Porter v. King*, 1 Greenl. 297; *Tice v. Annin*, 2 John. Ch. 125; *Schnell v. Schroder*, 1 Bai. Eq. 334.

But a mortgagee may attach and levy on the mortgaged fund for a debt not secured by the mortgage. *Cushing v. Hurd*, 4 Pick. 253.

When an equity of redemption is sold under an execution, the purchaser takes such interest as the defendant on the execution had. *Crow v. Tinsley*, 6 Dana, 402; *Hartshorne v. Hartshorne*, 1 Green, Ch. 348. See *Worthington v. Lee*, 2 Bland. 678. See further on the subject of levying upon or selling an equity of redemption under an execution, *White v. Bond*, 16 Mass. 400; *Warren v. Childs*, 11 Mass. 222; *Kelly v. Burnham*, 9 N. Hamp. 20; *Steward v. Allen*, 5 Greenl. 103; *Fitch v. Ayer*, 2 Conn. 143; *Coombs v. Jordan*, 3 Bland. 284.

The right of a mortgagor to redeem his estate is almost universally liable, in the United States, to be taken upon execution by his creditors. See 1 Hilliard's Abr. Law of Real Estate, ch. 35, and cases cited; *Pritchard v. Brown*, 4 N. Hamp. 402; *Kelly v. Beers*, 12 Mass. 388-390.

(c) Acc. *Allison v. Gregory*, 1 Murph. 333.

[*481]

*CRESSETT and Others v. MYTTON.

[Vide S. C. 1 Ves. jun. 449.] Lincoln's-Inn-Hall, 12th March.

(No Entry.)

In a bill to perpetuate testimony of a right of common and way, the plaintiffs claimed a right of their estates, or otherwise — this is too loose: a demurrer, therefore, allowed. (1)

THE bill stated that the plaintiff, Elizabeth Cressett, was lady of the manor of Holdgate, com. Salop, as lessee for lives under the Bishop of

(1) See also *Gell v. Hayward*, 1 Vernon, 312; *Loker v. Rolle*, 3 Ves. 4, and *Ryves v. Ryves*, *ibid.* 343.

Worcester; that the plaintiff, the then Bishop, in right of his see, was entitled to the reversion of the said manor, and that some of the other plaintiffs were seised of the inheritance in fee, of certain messuages, &c., and others of them occupiers of other messuages, lands, &c., in the township of Holdgate, &c., and that the tenants, owners, and occupiers of the said messuages, lands, tenements, and hereditaments, in right thereof or otherwise, have from time, &c., and of right ought to have, and still of right have and ought to have common of pasture in and upon a certain waste, or common, called Brownblee, for their horses, sheep, and other cattle, and also a way or road for themselves, &c., over certain enclosed lands in the parish of Diddlebury, in the county of Salop, belonging to the defendant, Thomas Mytton, known by the name of Earnesty Park (tracing the road), and which said road, or way, is separated from the adjoining grounds.

The bill further stated, that the defendant was seised of the inheritance of the lands, &c., and of the soil of the road, and that three years ago the defendant sent to forbid the plaintiff's tenants from turning their cattle on the common, or using the way, pretending a sole right of way and common, but had never commenced any action or proceeding to try the right, or obstructed them in the exercise thereof.

And the bill charged, that although the defendant now permitted plaintiffs to exercise their rights, by which means they were unable to bring them to trial at law, yet he declared, that after the death of their witnesses he would dispute their right, and therefore prayed to have their witnesses examined, and their testimony perpetuated, &c.

To this bill the defendant demurred; and for cause of demurrer, showed that the plaintiffs had not stated any legal right, in any persons to have common or way in the premises, and that there are joined in the bill, several persons as plaintiffs, who appear by their own showing, to have distinct rights to their estates, *and to their supposed right of [*482] common and way, and that it does not appear, in respect of what messuages, lands, or tenements, in particular, the right of common and way is claimed.

Mr. *Lloyd*, for the plaintiff, contended that the bill was properly brought; that the distinction is, that the Court will not permit parties to bring a bill where they have an opportunity of trying their rights at law; (2) but wherever the parties are so circumstanced that they cannot try their rights the Court will direct a commission to try them; that the present case was the stronger, because the defendant, though he threatened a future contest of the right, permitted the present exercise of it; that a party in possession of such a right may maintain a bill, *Duke of Dorset v. Girdler*, Prec. in Chan. 531, because he cannot bring an action. It is shown as a cause of demurrer, that the plaintiffs have not stated their legal right. But the Court never expects, in cases like these, that the right should be stated with the same precision as it is necessary to do in a declaration at law. It is asserted here, that the plaintiffs have a right, and it is not necessary to state it further. It is not necessary to state the right particularly. *Mayor of York v. Pilkington*, 1 Atk. 282. (3)

LORD CHANCELLOR. You have not stated whether the right of way and common is appurtenant or appendant to the land, &c., that you hold — and you state it loosely, that you have such right as belonging to your estate, or

(2) See *Welby v. D. of Rutland*, 2 Bro. P. C. 39 (octavo ed.) and vol. vii. p. 227, in the folio ed.

(3) But see contra *Gell v. Hayward*, 1 Vern. 312, and the other cases in note (1), *antea*.

otherwise, so that your bill is to have a commission to try any right of common and way whatever. The difference between special pleadings, and pleadings in this Court, is, that a great deal of verbiage is allowed here; but still, there must be some substance. If you want to perpetuate evidence, you must show [what, and] by what right, you claim. (a)

Demurrer allowed.

(a) See 1 Madd. Ch. Pr. (4th Am. ed.) 191; Story, Eq. Pl. ch. 5, § 241; ch. 7, § 305; Jerome v. Jerome, 5 Conn. 352; Gell v. Hayward, 2 Vern. 312.

[*483] *HALL, Widow, and Others, v. NOYES and Others.

Lincoln's-Inn-Hall, 13th March.

(Reg. Lib. 1791. A. fol. 192.)

[A defendant having submitted to answer, must answer fully. (1) (a) If a plaintiff states a false title, and requires an account upon the foot of it, the defendant, to avoid setting forth the account, should put the real fact in issue by a plea; and cannot by answer only insist that he is not bound to answer the particulars. A plea of a negative, that a plaintiff is not the person, or in the situation alleged, as of "no partner," "not heir," is good.] (2) [Although a defendant cannot by answer avoid answering fully to all particulars grounded on the plaintiff's title; he may yet avoid setting forth the particulars of accounts, if he, even by answer distinctly negative, having any subject-matter of account, referable to the plaintiff's title as stated in the bill. Note.] (b)

BILL by the executors of Hall, who had become a bankrupt, and was since dead, against the defendants, praying accounts of profits received from leasehold property assigned to them by the bankrupt, and a redemption of the same, upon payment of money really advanced, with interest.

(1) See Cartwright v. Hately, and Shepherd v. Roberts, antea, 238, 239, with the Editor's notes and references; more especially to Beames's Elem. Pl. 120, et seq.

(2) It will be seen by Lord Thurlow's own admission, in the principal case (postea, 489), and by the authorities above referred to, that he once held such negative pleas bad; but that the law is now settled, ut supra. See in particular Newman v. Wallis, antea, 2 vol. 143, with the Editor's notes, 16 Ves. 264, 265, &c.

It is very singular that a material point in equity-pleading seems to have occurred in the above-mentioned case of Shepherd v. Roberts, after the allowance of the exceptions to the Master's Report as stated, antea, 239; and that such point seems unreported. The following is the account of it from Sir J. Simeon's MSS. annexed to the MS. report of the principal case:—

"N. B. In Shepherd v. Roberts, [after the allowance of the exceptions as stated in 3 Brown, 239,] the defendant put in a further answer, denying he had any partnership assets, screening himself under the implied assertion that there was no partnership. On exceptions, the Master thought the answer substantially the same with the former; and, therefore, thought himself bound by the Chancellor's order to allow the exceptions; and on exceptions to the Master's report, Lord C. thought his former opinion wrong, and that the defendant might protect himself against the discovery by denying the partnership, and therefore allowed the exceptions to the Master's report."

It appears from the last edition of Lord Redesdale's work, that his Lordship seems to think the whole subject requires further consideration. See pp. 187, 188, (3d ed.)

(a) See the rule stated, the cases enumerated to which it applies, and the qualifications of it, in 1 Barbour, Ch. Pr. B. 1, ch. 6, § 5, p. 131–133. See also Wigram on Discov. (Am. ed.) Pl. 148, 149, &c., p. 86, 87, et seq.; Cookson v. Ellison, 2 Bro. C. C. 252, and note to that case on this point; 2 Madd. Ch. Pr. (4th Am. ed.) 339, 340; Adams v. Fisher, 3 Mylne & Craig. 526; Cartwright v. Hately, ante, 238, 239, n. (a); Cuyler v. Bogert, 3 Paige, 386; Hagthorpe v. Hook, 1 Gill & John. 272; Bank of Utica v. Messereau, 7 Paige, 517; 1 Hovenden's Supp. to Vesey jun. 126–128, note (1) to Cartwright v. Hately, 1 Ves. jun. 292.

(b) See 1 Barbour, Ch. Pr. B. 1, ch. 6, § 5, p. 131, 132. A defendant cannot, however, in his answer, excuse himself from making a full discovery by merely denying the complainant's title to discovery and relief, ib. 132, 133; Bank of Utica v. Messereau, 7 Paige, 517.

The bill stated that the trustees appointed by an act of Parliament for dividing commons, &c. in the parish of St. Mary Newington, in Surry, demised premises situate at Walworth Common, to Hall, the bankrupt, for ninety-nine years, at the rent of 66*l.* per annum, and that John Neale had also let to Hall a close, at Hazard's Bridge, for sixty-five years, at a rent of 30*l.* per annum; that, afterwards, Hall becoming a bankrupt, and having obtained his certificate, repurchased the premises from his own assignees, for 245*l.*; that the close at Hazard's Bridge being very valuable, on account of its containing a large quantity of brick earth, and having it in contemplation to make bricks there, and wanting money for that purpose, Hall applied to the defendant Noyes, to assist him with a loan, which Noyes agreed to do; but, as a security, required Hall to make an assignment of one moiety of the close to him, which was accordingly done, upon a nominal consideration of 262*l.* 10*s.* but which was not paid, Noyes only giving Hall three promissory notes for 30*l.* 20*l.* and 20*l.*, the acceptance of a draft by Hall for 100*l.*, and a sum of 40*l.* in cash: that Hall having granted building leases of some of the premises, and having occasion for money, applied to Cross, afterwards a bankrupt (of whom some of the defendants are assignees), and requested him and the defendant Noyes, to advance him 1000*l.* on the mortgage of the lease of the ground at Walworth, and of the other moiety of the close at Hazard's Bridge; but the said sum of 1000*l.* was not all paid to Hall, but some part of it only, to the amount of 245*l.*: and Hall having contracted with one Pye, for the purchase of a leasehold estate at Kent Bar, for the remainder of a term of twenty-one years, for 335*l.*, and Noyes and Cross having given some security to Pye, for such 335*l.*, said 335*l.* also made *part of such consideration-money, and Pye and Hall assigned the [*484] said leasehold estate, subject to the reserved rent thereon, to Cross and defendant Noyes, subject to redemption on payment of the said sum of 1000*l.* and interest, and Noyes and Cross took from Hall his bond and warrant of attorney, as a further security, upon which warrant of attorney judgment was afterwards entered up. The defendant Noyes afterward having lent, or pretended to have lent, Hall promissory notes, to the amount of 271*l.*, as a security for the same, took his bond, in the penalty of 600*l.* for securing payment of 300*l.*, and a warrant of attorney for the same; upon which he afterwards entered up judgment, and caused writs of *f. fa.* to be issued; and, by means thereof, levied and had satisfaction for all or nearly all the money due.

The bill further stated, that a commission of bankruptcy was soon after issued against Cross, and the defendants Carr and Evans were chosen assignees.

The bill further stated, that the defendant Noyes, in August, 1776, got into possession of the close at Hazard's Bridge, or of one moiety of it, and made considerable profits by cutting and making hay thereon, and taking in cattle to feed; and on behalf of himself and Cross, or his assignees, got into possession of and into the receipt of the rents of the mortgaged premises, and by that means was satisfied the interest and part of the principal of the said 1000*l.* That Hall being involved in debt, Noyes and the other defendants took advantage thereof, and got him to sign an account that 1400*l.* was due from him on the mortgage, and also that he was indebted to Noyes on other transactions 80*l.*, and got him to execute a second mortgage, to secure 1451*l.* and 80*l.* and interest, with a power to sell, and to take the sum, for which the premises should be sold, as a security for the said sum and interest, with a trust, to pay the sur-

plus, if any, to Hall. The bill then stated, that Hall and Noyes made a considerable quantity of bricks, on the close at Hazard's Bridge, and that Noyes having taken an absolute assignment of one moiety of the said close, but being conscious that it was intended only as a security for the money really advanced, but pretending, that by virtue of the assignment, he was entitled to one moiety of the said close, he, as an inducement [*485] to Hall to execute the indenture of 6th July, 1780, gave him to understand, that if he would do so, and would allow him, defendant Noyes, 210*l.*, as the money advanced by him on the said assignment, and 266*l.*, which he pretended to have laid out in making bricks (though he had not laid out so much), and would let the said moiety be a security for the same, as well as for said sums of 145*l.* and 80*l.*, he, the defendant Noyes, would permit Hall to redeem, and become the owner of said moiety; and by such means Hall was induced to execute the said deed; and a deed-poll was accordingly prepared, under the direction of defendant Noyes, and duly executed by Hall and Noyes, reciting those terms; and it was thereby witnessed, that in case Hall should pay the said sums, and all Noyes's future disbursements on account of the moiety, on or before the 6th October then next, Noyes should reassign the premises to Hall. The bill further stated, that the defendant had sold the premises at Kent Bar, to one Rolls, and had sold a moiety of the close at Hazard's Bridge (being, as is alleged, the moiety which was comprised in the deed of 6th July, 1780), by auction, to one Robinson, but in fact, in trust for Noyes (to whom it had been afterwards assigned), for 105*l.*, who had procured the lease to be delivered up to him; that in December, 1781, he surrendered the lease to the landlord of the premises, and obtained from him a new lease, dated 22d December, 1781, for twenty-one years from Christmas then next, at the rent of 15*l.* a year, whereby the landlord gave defendant Noyes license to break up the soil and make bricks thereon, upon payment of a fine of 925*l.* in addition to said rent of 15*l.* yearly.

The bill further stated, that defendant Noyes made large quantities of bricks, by means whereof, after payment of the rent and fine, large profits were made. It then stated, that Hall, being taken in execution for debt, assigned his equity of redemption (for a nominal consideration of 500*l.* but of which he received only 40*l.*), to the defendant Schoole, who assigned one moiety thereof to the defendant Rybot, and the death of Hall without being able to redeem, and that, by his will, he made the plaintiffs executors; that Noyes and the other defendants were still in the possession of the premises at Hazard's Bridge and Walworth, and by the profits thereof had been fully paid the sums really advanced to Hall, and had a considerable surplus in their hands; and, therefore, the plaintiffs [*486] insisted they had a right to redeem, and prayed an account of the rents and other profits of the mortgaged premises, and that the same should be applied in sinking the principal and interest of the debt, and that, upon payment of the residue, the defendants might reassign the premises to the plaintiffs.

The defendants put in very long answers to this bill, stating the transactions very much at large, but of which the import was, to insist that the real transaction was a sale from Hall to them, and, after such sale, the defendant Noyes acknowledged, that he made bricks on the premises at Hazard's Bridge, but insisted that he was not bound to discover what quantity of bricks were made, or to set forth whether other profits had been made from the said close, or any particulars relative thereto, as it

appeared by plaintiffs' own showing that Hall had assigned all his interest in the premises to Schoole, and that the same is now vested in defendants Schoole or Rybot; and, for the same reasons, the defendants insist plaintiffs are not entitled to any account of the rents, profits, or produce of the premises; and in a further part of their answer the defendants said, "they hoped they should be allowed such benefit of the several mortgages and circumstances before set forth in bar of such discovery and relief, as if the same had been set forth by way of plea or demurrer to the said bill."

To this answer, several exceptions were taken, some of which had been allowed by the Master, but others disallowed by him. The disallowed exceptions went to the answer not having discovered the profits made of the close at Hazard's Bridge, either by cutting hay thereon, or otherwise, or how the debts for which the mortgages were made were incurred, and particularly as to the number and quality of the bricks made on the premises at Hazard's Bridge, or the sums of money received for the same.

It came on now, upon exceptions to the Master's report.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Abbot*, for the defendants, argued, that although they had submitted to answer in a case where they might have pleaded or demurred, yet the general rule that, where a party submits to answer, he must answer fully, did not apply in the present case; that submission will not entitle the plaintiff to a long account in a case where a defence is set up, that meets his title. (3) Here the defence, on the part of the defendant Noyes, is, that he is a purchaser, not a mortgagee; and that defence is not merely set up by Noyes, but it appears upon the face of the bill, and is affirmed by Hall himself in his lifetime. If the plaintiffs can make a case, to show they have a right to redemption, then they will be entitled to have an examination as to every particular now excepted to; but, till they show that, they are not entitled. It is not charged in the bill, that the assignment to Schoole was fraudulent. Schoole may now obtain the absolute interest in the estate; and, whilst his title is out against the plaintiffs, they can have no relief. Wherever an answer denies the matter of the suit, the Court will not compel the defendant to answer what is consequential to the decree; it will not enforce an account whilst the title is doubtful. *Sweet v. Young*, Ambl. 353, shows, that, where the plaintiff's title is doubtful, the defendant is not compellable to set forth an account. So in *Gethin v. Gale*, there cited, which was a bill for the possession of real estate, upon the ground that the defendant was illegitimate, Lord Hardwicke was of opinion, till this was established, the plaintiff had no right to an account. So, in a case in the Exchequer, where a defendant, though he had not pleaded that he was a purchaser for valuable consideration, but had insisted upon it (as is done here) by answer, the late Mr. Baron Perrott said he should not be obliged to produce his title-deeds. Whilst the plaintiff's right is in contest, the account is immaterial; and whilst immaterial, the Court will not compel it. *Gilb. Forum Romanum*, 106.

(3) See the case of a vicar whose title was denied; in which case the Court of Exchequer held, the party need not set forth an account of tythes. Stated *arguendo*, 11 Ves. 286. The name of the other case there also stated as recent was *Tiffin v. Clarke*, 31st January, 1804. It was a bill for tythes brought by a vicar. The defendants stating the right to be in the rector, objected by answer to set out the account. Exceptions were taken to this; but they were overruled in full court. Editor's MS. note. Lord Redesdale thinks the point still requires further consideration, notwithstanding the authorities referred to, *antea*, 238, 239, &c. See *vide Somerville v. Mackie*, 16 Ves. 382, et seq.

The case in 2 Vesey, 445 (*Buden v. Dore*), is to the same purpose, though, in that case, the defendant might, having pleaded. To the same effect was ——— *v. Taylor*, before Lord Bathurst. In *Jacobs v. [488] Goodman*,† in the *Exchequer, November 16, 1791, the defendant said in his answer, that plaintiff was a servant, not a partner, and therefore resisted the account. The Lord Chief Baron held the plaintiff not entitled to an account, until he proved a partnership; because, otherwise, any person, by alleging a partnership, might entitle himself to an account. If parties cannot plead in bar to the account, but must answer, this inconvenience will follow, that any person may have an account. The principle on which the plea in *Newman v. Wallis* (ante, vol. ii. p. 143) was overruled, does not extend to all cases; it applies where the plea goes to the whole case, but not where the title and the account are separate, and the account is consequential to the title: though the Court will compel an answer as to the title, it will not compel an account till the title is established. Here it is a preliminary point, that the party has put the title out of himself.

Lord CHANCELLOR (in the course of the argument, and at the [489] close of it) said, supposing the case supplied matter for a *demurrer, he could not take notice of the cause of demurrer on exceptions. It might have been cause of demurrer that Hall, having assigned his equity of redemption to Schoole, till he had displaced that estate, had not a right to a discovery: in such a case, the defendant might have met the plaintiff's title by a plea; and though he had held, upon a former occasion, that a negative plea (4) was bad, he believed he was wrong in

† *Jacobs v. Goodman*. — This was an injunction-bill filed by the plaintiff, in order to enjoin defendant from proceeding in an action at law, commenced against him for the recovery of 100*l.* borrowed by the plaintiff of defendant: and the bill stated a partnership to have existed between plaintiff and defendant, and an account unsettled between them in respect of the partnership; and it alleged, that, on taking the account, it would be found that nothing was, in fact, due upon balance of all accounts to the defendant, and the bill called for an account of the partnership transactions. Defendant, by his answer, stated the agreement respecting the business to be, that plaintiff came to him and represented that he was well versed in the trade of glass and beads, and that if defendant would engage in it, he (the plaintiff) could be of great assistance to him; that it being convenient to defendant to advance the necessary sum, he did accordingly engage in the business, agreeing that if, at the end of six months, it appeared that plaintiff had managed the trade to advantage, he should be allowed one third of the profits. And defendant denied that plaintiff had any other concern in the business, or that he was liable for any of the transactions thereof, save as it might happen for misconduct as a servant. And further denied that there was any other agreement between them other than as aforesaid, or that they had any connection in business other than as aforesaid. He further stated in his answer, that this 100*l.* was borrowed of defendant by the plaintiff, in order, as he said, that he might assist a sister who was in business. That plaintiff left defendant at the end of nine weeks, and then wrote to him an apology for thus leaving him, but adding that he would send him the 100*l.* in a few days. Exception was taken to this answer, because defendant had set forth no account, and because defendant had not set out what balance was due to him, and how he had made out the same.

Mr. Johnson, in support of the exception, stated that defendant could protect himself from setting out an account only by a plea or demurrer, and that having answered, it was not sufficient to deny a principal fact, which would be a defence, but he must go on to answer all the collateral matter.

But the Court were of opinion that the answer was sufficient in this case. (c)

Lord Chief Baron. You are not entitled to an account, unless there be a partnership, and your position goes much too wide. At that rate, if an utter stranger was to file a bill against Child's shop, alleging a partnership, it could not be sufficient to deny that any such partnership existed. There may be cases where the Court will require an account, although the principal point in the bill is denied. But not in a case like this. Suppose to a bill for tithes, the defendant answered he was no occupier, or in many other cases of that kind, would not such an answer be sufficient?

Exception overruled.

(4) Reported ante, 2 vol. p. 143. See also Lord Eldon C.'s statement of this fact in *Jones v. Davis*, 16 Ves. 264, 265, and in *Somerville v. Mackie*, *ibid.* 387; *Beames's El. Pl.* 120, 123, and note, 130, 256, et seq.

(c) See 1 Barbour, Ch. Pr. B. 1, ch. 6, § 5, p. 132.

holding so, (d) for that wherever a plea will reduce the question to one point, it is admissible. All the cases cited were cases where the title was completely separate from the account: in that before the Lord Chief Baron it was completely so; and he could not say that, where it was so, the party was bound to give the account; but, in the present, he thought they were, and therefore allowed the exceptions.

(d) It is now well settled, that such pleas are good. Story, Eq. Pl. ch. 13, § 651, and note (1) to page 495; *Faulder v. Stuart*, 11 Ves. 302; *Sanders v. King*, 6 Madd. 61; *Hardman v. Ellames*, 2 Mylne & Keen, 740; 2 Daniel, Ch. Pr. 99, 100, 110, 111; *Warrington v. Mothcrsill*, 7 Price, 668; *Newman v. Wallis*, 2 Bro. C. C. and note (a) to p. 147.

TEW v. The Earl of WINTERTON.

FORSTER v. The Earl of WINTERTON.

FORSTER v. FORSTER.

Lincoln's-Inn-Hall, 14th, 16th March. [Vide S. C. 1 Ves. jun. 451.]

(Reg. Lib. 1791. B. fol. 276. &c.)

Interest on an old bond cannot be computed beyond the penalty. (1) (a)
The court will not give interest on the arrears of an annuity, secured by a bond which had been taken in satisfaction of dower. (2)

THESE causes comprised several questions as to the affairs of the family of Forster.

(1) The doctrine seems quite settled now, accordingly, both at law and in equity, contrary to Mr. J. Buller's dicta, in *Lord Lonsdale v. Church*, 2 T. R. 388, and his decision in *Knigh v. M'Lean*, postea, 497. Lord Thurlow overruled the latter decision (vide postea, 496, &c.), in which his Lordship was supported by former authorities. See *Gibson v. Egerton*, 1 Dick. 408, with the previous cases cited, *ibid.* 409. For later cases, referring to various of the authorities, vide *Clarke v. Seton*, 6 Ves. 411, 414, 415, and 1 Ball & Beat. 311; *Lloyd v. Hatchett*, 2 Anstru. 525, &c. The cases capable of support, in which interest has been allowed beyond the penalty, are distinguishable by some particular speciality, as in that of *M'Claire v. Donkin*, 1 East, 436, where the action was not upon the bond, but upon a judgment recovered. See also per Sir W. Grant, M. R. 6 Ves. 415, 416, and Mr. Serjt. Williams's note on *Gainsford v. Griffith*, in his edition of *Saunders's Rep.* 1 vol. 58. < *Denny v. Lord Ennis-kellin*, 2 Moll. 535. See also Eden's note, post, 496. >

(2) The decision on this point also seems perfectly sound, and supported by the authorities to an extent much beyond the case within cited (p. 495), as *Anon.* 2 Ves. 661, where Lord Hardwicke is represented to state that the Court might allow such interest "in a very special case," as if a widow had been obliged to borrow money and pay interest for it, &c. That special case had precisely occurred, even before Lord Hardwicke himself, in the instance of the Duchess of Wharton; but his Lordship, though sensible of the peculiar hardship, and very anxious to allow the claim, found himself, after every search for precedents, unable so to do. Vide in *D. of Bedford v. Coke*, 1 Dick. 178. This was in the year 1743. The case above referred to as *Anon.* in 2 Ves. 661, was in 1755, and is reported in 1 Dick. 278, sub. nom. *Bigual v. Brereton*; where (it is observable) the above dictum as to the Court's interfering in such a special case does not appear; so that the correctness of the report in *Vesey* seems rather doubtful. The above two cases are particularly noticed, and the doctrine stated as above by Lord Loughborough, C., in *Creuze v. Hunter*, 2 Ves. jun. 166, 167; but it must be observed, that Lord Thurlow himself did in one case direct interest to be computed on the arrears of an annuity, where the widow had been restrained by an injunction in the cause from enforcing due payment. See *Morgan v. Morgan*, 2 Dick. 643.

As to the question of interest upon arrears of dower, it seems as yet to be governed by the same authorities as apply to the case of arrears of jointure, *et similia*. Mr. Roper, however, though he admits (in his recent publication upon the Law of Baron & Feme) the general rule has been considered as incapable of relaxation, even in the most distressing cases of dower as well as jointure, makes a material distinction in point of argument between those instances. See 1 vol. 451-453. That gentleman founds the distinction that, in the case of jointure

(a) See note (a) next page.

John William Bacon Forster, Esq., and the Reverend Henry Wastell, clerk, having several money transactions together, and in particular having entered into bonds for each other; and the said John William Bacon Forster, being then at the point of death, Henry Wastell applied to him to execute, and he did execute a bond, bearing date the 14th of April, 1767, in the penal sum of 7700*l.*, for securing the payment of 3850*l.*, with legal interest for the same; and also a warrant of attorney, to confess judgment on the same, and which judgment was afterwards entered up.

On the 21st day of the same month, the said John William Bacon Forster made his will, and thereby devised his real estates to trustees, for payment of his debts and other uses.

[*490] *And on the 27th of the same month the testator died.

By deed-poll, dated 11th of November, 1767, the said bond and judgment, and the principal and interest secured thereby, were assigned by the said Henry Wastell to Edmund Tew, for securing the principal sum of 1000*l.*, and the same were afterwards made a security for the further sums of 600*l.* and 400*l.* and interest; and the same were afterwards assigned by Wastell to Snow Clayton (subject to the prior assignments), as a security for 2250*l.*

In Michaelmas term, 1768, the plaintiffs in the first cause filed their bill on behalf of themselves and other creditors of the testator, to have their debts raised and paid. In Hilary, 1769, the plaintiffs in the second cause filed their cross-bill, to have all the demands on the estates liquidated and paid.

which arises from contract, provision might have been made for interest in such contract, upon any arrears that might be incurred: whereas a widow's right to dower arising from operation of law, and equity professing to give a concurrent and more effectual assistance, it must appear singular, that she should have a relief less extensive in equity than she could obtain at law. Mr. Roper, referring to *Curtis v. Curtis*, ante, 2 vol. 628, 629, and to Lord Thurlow's remarks in the principal case, postea, 495.

(a) Upon a money bond given by a principal debtor, the obligor is both legally and equitably liable for the whole amount of the principal and interest secured by the condition of the bond, although such amount exceeds the penalty of the bond. *Mower v. Kip*, 6 Paige, 89; *Judge of Probate v. Heydock*, 8 N. Hamp. 491. See also to this point, *Baker v. Morris*, 10 Leigh. 285. In *Harris v. Clap*, 1 Mass. 308, interest was given in the shape of damages, even as against a surety, although the principal and interest exceeded the penalty of the bond. See also *Pitts v. Tilden*, 2 Mass. 118; *Rand's ed.* 119, note (b); *Atwell v. Fowles*, 1 Munf. 175; *Tenant v. Gray*, 5 Munf. 494; *Smedes v. Houghtaling*, 3 Caines, 43; *Bank of the U. S. v. Magill*, 1 Paine's C. C. 669; *Treadwell v. McNeal*, 2 John. Cas. 340; *Carter v. Carter*, 4 Day. 30; *Troup v. Wood*, 4 John. Ch. 228; *Graham v. Bickham*, 4 Dall. 149; *Warner v. Thurlo*, 15 Mass. 154, and *Rand's note*.

In this last case, it is held, that judgment may be given for the penalty and interest from the commencement of the suit and no more. For this limitation of the period, for which interest is to be calculated, the court rely upon *Harris v. Clap*, 1 Mass. 308. There is, however, no authority for such a limitation to be found in that case. It was there held, that the penalty and interest from the demand must be the measure of the judgment; not exceeding, however, the sum awarded, and interest upon it, from the time of payment, according to the condition of the bond. 1 Mass. 313, 314. In *Harris v. Clap*, *Sedgwick, J.* dissented from the opinion of the rest of the court in reference to the allowance of any sum beyond the penalty of the bond. In *Warner v. Thurlo*, *ubi supra*, the court say, "by the latest decisions in England, it seems that nothing beyond the penalty can be recovered." But in *Francis v. Wilson*, 1 Ryan & M. 105, it was held by *Littledale, J.* that in debt on bond in a penalty of 120*l.*, conditioned for the repayment of the same sum with lawful interest, such interest is recoverable beyond the penalty.

In a similar case, however, *Lord Tenterden, C. J.*, gave only the penalty of the bond and 1*s.* damages for detention. *Hellen v. Ardley*, 3 Car. & Payne, 12, and see the learned note on this subject at the end of that case.

But judgment on a bond cannot exceed the penalty thereof and interest from the breach, although the sum actually be larger. *U. States v. Arnold*, 1 Gall. 348.

In *Potter v. Webb*, 6 Greenl. 14, the question, whether interest can be computed beyond the penalty of a bond given for official good conduct, was raised and left undecided. See also *U. S. Bank v. Magill*, 1 Paine, C. C. 661.

By a decree in the two first causes, 11th of July, 1774, the proper accounts were ordered to be taken, and proper inquiries to be made respecting the specialty debts of the testator.

By the Master's general report, dated 13th February, 1792, he certified (among other things) that he had set forth, in the third schedule to his report, a particular account of the specialty debts of the testator, John William Bacon Forster, with interest on such of these as carried interest, after the rate they respectively carried, computed to the 20th day of April, 1792, except on such debts where the interest exceeds the penalty, and in that case had only computed interest to the amount of penalty, and to whom the same are respectively due.

Exceptions were taken to this report by some of the bond creditors, because the Master had not computed interest beyond the penalties of their respective bonds, and particularly by Tew and Clayton, in respect to their assignment of the bond to Wastell, concerning which, the Master had reported, that there was due to Tew, for principal money, 1000*l.*; and for interest, from the 4th of February, 1770 (to which time all interest had been paid), to the 4th of February, 1790, being twenty years, at five per cent., 1000*l.*, making, together, 2000*l.*, the penalty of the bond; and that there was also due to Tew the further sum of 600*l.* which *Tew had lent to Wastell, who, by indenture, dated 4th August, [*491] 1768, had charged the same on the bond and judgment, and for interest (as above) 600*l.*; that there was also due a further sum of 400*l.* principal, and 400*l.* for interest, under similar circumstances, making in the whole 4000*l.*; and that there had been paid Tew by Alder, the late receiver of the estates, on the 8th September, 1789, the sum of 500*l.*, which reduced the principal and interest due to Tew to 3500*l.* And the Master reported, that there was due to Nathaniel Clayton, the executor of Snow Clayton, on the assignment from Wastell to him, the principal sum of 2250*l.*, and for interest from 27th January, 1770, to 27th of January, 1790, the sum of 2250*l.*, amounting together to 4500*l.*, the penalty of the said bond.

Mr. Solicitor-General, and Mr. Steele, in support of the exceptions. The exceptions are on the ground that the Master has been wrong in calculating interest only to the amount of the penalty in the bond; whereas he was bound by the reference to report the interest due. The direction in the reference imports that he is to report upon the condition in the bond; it does not give him authority to stop at the penalty, contrary to the expression in the reference. It is also against reason to stop short of the interest really due, as the whole might be recovered at law. This is established now at law, by the case of *Lord Lonsdale v. Church*, (3) 2 Term Rep. 388, where Mr. Justice Buller said, he was not satisfied with the case of *White v. Sealy*, Dougl. 48, though that was distinguishable, as being the case of a surety. In *Elliot v. Davis*, Bunb. 23; in *Holdipp v. Otway*, 2 Sound. 106; and *Duwall v. Terrey*, Shower's Parl. Cas. 15, the penalty is considered merely as a security. We must admit that interest is given at law as damages; and, perhaps, it may be argued that it is not referred to the Master to calculate damages; but if the penalty is not the real debt, but only the security, and the debt is the principal and interest, then it is within the terms of the reference of what is due. In fact, it would be unreasonable not to do this for a bond creditor; because, after a decree for administration of assets, if the

(3) Mr. J. Buller's doctrine there is now overruled, vide note (1), ante.

creditor brings an action, he is stopped by the decree, and the decree operates as an injunction from taking his legal remedy: then the Court will not prevent his taking his legal remedy without giving him something as beneficial, which it will not do unless it calculates the interest [*492] beyond the penalty. The penalty is only meant to operate where *the debt and interest are less. Under the circumstances of Clayton's case, particularly, the whole interest should be allowed. He could only take subject to Tew's claims, and 500*l.* had been paid to Tew without any application. He was a judgment creditor, and therefore should have his whole interest. Hard. 136, 3 Atk. 517, *Godfrey v. Watson*. If the debtor comes into equity for relief, he must pay interest, though beyond the penalty.

Mr. Lloyd, in support of the Master's report. The practice was settled in the case of Sir Stephen Evance's creditors, 1 Atk. 80 (*Bromley v. Goodere*), that upon bonds no interest can be given beyond the penalties. In *Kettleby v. Kettleby*, (4) 1st December, 1774, there was a decree for payment of creditors. Some of the bonds were seventy years old. The creditors insisted that, the fund being ample, they ought to be paid their full interest. On the other side, the practice was insisted upon; and Master Montague (to whom it was referred) consulted all the Masters. His report was excepted to, and the exception was argued before Lord Bathurst and the Master of the Rolls, who were both clearly of opinion that the practice ought not to be broke in upon. (5) In the late case of *Knight v. Maclean*,† your Lordship inclined to the same opinion, though you did not decide it.

LORD CHANCELLOR. I thought I had decided that case. I do not know what they may do at law, when the rule which has been alluded to comes to be pushed to all its consequences. How far back will they take it? How can it be taken against an heir, or in the case of an administrator, where they declare only in the *debet*? If you insist that the bond is not a security for the penalty, but for some other debt, the Master is not competent to vary the contract.

I cannot possibly alter the course of the Court. If the Master had taken the circumstances under consideration, he would have been mistaken.

Exceptions overruled.

Another question arose in the third of these causes, under the following circumstances:

[*493] *William Bacon Forster, in contemplation of a marriage with Frances Pewterer, who was afterwards his widow, and now the wife of the defendant, Bentham, entered into a bond, bearing date 20th February, 1780, in the penal sum of 10,000*l.*, conditioned that he should, as soon as conveniently might be, convey sufficient freehold or copyhold estates, in trust to raise and pay to said Frances Pewterer, in case she should survive him, during her life, a clear annuity of 600*l.* in full satisfaction and bar of dower, &c. And by a memorandum subscribed to the said bond, and signed by the said Frances Pewterer, she declared that

† See the next case, p. 496, the decree not having been made till after the decision of this case, though it was argued before it, and very much at large.

(4) Since reported, 2 Dick. 514.

(5) The late Ch. Baron Thomson was counsel in that cause, and observed, that although interest for seventy years was paid to the creditors by simple contract under force of the devise there, the bond creditors were in a much worse situation, being allowed interest to the extent only of the penalty. Vide in *Lloyd v. Hatchett*, 2 Anstr. 527.

she did freely accept of the said jointure, in full bar and satisfaction of and for all dower and thirds, to which she might be entitled on account of the said marriage. On the 23d February the marriage took effect, and on the 15th of April following, William Bacon Forster died, leaving his widow *enciente* with the plaintiff in the third cause.

By a decree in this last cause, the 3d of February, 1790, it was ordered, that the former decree should be carried into execution, and (among other things) it was ordered that this bond and memorandum should be established, and that the defendant, the widow, having agreed to accept the annuity of 600*l.* out of the real and personal estate of her said late husband, in bar of dower, it was declared that she was to be considered as a specialty creditor of her said late husband, and was entitled to be paid the arrears of her said annuity from his death, out of the personal estate of her late husband, in a course of administration; and if the same should not be sufficient, then out of the real estates of which he died seised in fee; and if those were not sufficient, then out of such estates of which he was tenant in tail, provided such deficiency did not exceed the amount of the dower to which she would have been entitled in case she had not, by the said memorandum, accepted the said annuity. And the Master was to take an account of such arrears, and was also to inquire and state what estates the said William Bacon Forster died seised as a tenant in tail, out of which the defendant, Frances, would have been dowable; and of the incumbrances on such estates.

By the Master's separate report, the 23d of June, 1789, he had certified that the only assets of William Bacon Forster, to satisfy *the said annuity, consisted of several sums of money received [*494] by the said defendant as his administratrix, and which then could not be ascertained; and he now, by his general report, and the schedule thereto, stated of what estates the said William Bacon Forster stood seised as tenant in tail; and that the same were subject to outstanding terms, to secure an annuity to Sarah, the widow of John William Bacon Forster, and other incumbrances; and submitted the question as to the defendant, Frances's, title to dower thereout. He further certified, that by orders of this Court, dated 27th of June, 1789, and 23d of June, 1790, the defendant, Frances, had been paid two sums of 300*l.* each; and that the whole of the annuity, from the 15th of April, 1780, to the 15th of April, 1792, then remained due to her, and amounted to 7200*l.* (except the said two sums of 300*l.* each), and that the rents and profits of the estates, out of which she would have been dowable, amounted to 23,289*l.* 14*s.* 9½*d.* subject to deductions; which reduced the same to 11,018*l.* 10*s.* 5*d.* And the Master also found that the said bond was the only specialty debt of the said William Bacon Forster.

The question now before the Court, was, whether the defendant, Mrs. Bentham, having received only the said two sums of 300*l.*, and having so great an arrear of her annuity due to her, should be paid interest on that arrear; and it was stated that she had been obliged to borrow money for her subsistence, during the time such arrear was run, for which money so borrowed she had paid interest; and that the funds, out of which she was entitled to the arrears, had been actually carrying interest during the whole time.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Ainge*, for the defendants, Bentham and his wife.

The question is, whether Mrs. Bentham is entitled to interest on the arrears of the annuity. In *Ferrers v. Ferrers*, Forrester, p. 2, it is said,

that a jointress is not entitled to interest on the arrears of an annuity, because the arrears are uncertain : and it has been laid down, that interest is not given, unless the party is obliged to come here to get rid of a penalty ; and that then the Court will compel the party to pay interest [*495] est. But in the case *reported, 2 Vesey, 661, (6) it is laid down that where a jointress is obliged to borrow money, and pay interest for it, that is a ground for the Court to give her interest on the arrears of her jointure. In the case of the *Drapers' Company v. Davis*, 2 Atk. 211, interest was given upon the arrears of an annuity, the sum being liquidated. That case does not differ materially from this ; in the present case, the annuity is secured by a bond ; and Lord Hardwicke there states the cases in which the Court will give interest, to be those of a wife and child, for whose subsistence the annuity is given. There cannot be a stronger case than the present, where no personal misconduct can be charged, the owner of the estate being an infant, and a sufficient fund being in Court from the rents of the settled estates, to a third part of the profits of which the defendant would have been entitled ; and which fund has actually been producing interest all the time.

Mr. *Solicitor-General*, and Mr. *Mitford*, for the plaintiff. No interest can be given. This is a mixed case ; it is true, that the jointress is, by the decree, to be considered as a specialty creditor ; but she is also to be considered as a dowress, and this Court has never given interest on arrears of dower. In the case of the *Drapers' Company v. Davis*, it was upon an ascertained annuity. In *Benniford v. Waring*, which was before the Court during the sittings after last Trinity term, an annuity was charged on the estate of Sir George Wynn, and your Lordship thought you could not give interest on the arrears. In the case of *Lindsay v. Gibbon*, in the year 1780, Lord Loughborough said, there were no cases warranted giving interest on dower. (a)

Lord CHANCELLOR said, if he was entitled to give interest, he must look into the cases for a ground on which to do so. (7) The Court has never given interest, but where there has been some ground from whence it could gather that there was a contract between the parties that interest

(6) S. C. 1 Dick. 278, sub. nom. *Bignal v. Brereton*. See also per Lord Loughborough, C. 2 Ves. jun. 167.

(7) See note (2) *ante*, 469.

(a) There are several cases in Dickens upon this subject, showing that this had long been the practice in the Master's offices. *Grosvenor v. Cook*, 1 Dick. 505 ; *Kettleby v. Kettleby*, *Rundle v. Pettit*, 2 Dick. 514 ; *Gibson v. Egerton*, *Bumatead v. Stiles*, 1 Dick. 408, in the last of which, Lord Camden was so clear upon the point, that he wished he had been warranted in making the exceptants pay costs. It has ever since been the uniform practice. *Lloyd v. Hatchett*, 2 Anstr. 525 ; *Sharpe v. Earl of Scarborough*, 3 Ves. 557 ; *Mackworth v. Thomas*, 5 Ves. 329 ; *Clarke v. Seton*, 6 Ves. 411 ; *Ex parte Rushworth*, 10 Ves. 409 ; *Butcher v. Churchill*, 14 Ves. 574. < *Ram on Assets*, ch. 39, § 2, p. 571, 572. >

The cases at law, contradicting the opinion of Mr. Justice Buller, in *Lord Lonsdale v. Church*, 2 T. R. 333, are *Brangwine v. Parrot*, 2 Bl. Rep. 1190 ; *Wilde v. Clarkson*, 6 T. R. 303 ; *Shutt v. Proctor*, 2 Marsh. 226 ; *McClure v. Dunkin*, 1 East, 436, in which, however, it was decided, when a foreign judgment had been recovered on a bond, in an action upon the judgment, interest might be recovered in damages beyond the penalty. Vide *Serjeant Williams's note to Gainsford v. Griffith*, 1 Saund. 58.

As to the application of this doctrine in bankruptcy in the event of a surplus, vide the Editor's note to *Ex parte Champion*, ante, 436, and as to the general doctrine upon the subject of interest, *Creuze v. Lowth*, post, vol. iv. 316 ; and the cases cited in the Editor's note ; also *The Attorney-General v. Mainwaring*, 2 Pr. 80, where the present case was relied upon by Richards, B., in differing from the Court upon the question, whether the crown was entitled to interest on the whole sum liquidated by the deputy remembrancer's report, upon a reference to ascertain what was due for principal and interest on a forfeited bond, where the funds in Court, out of which it was ultimately to be paid, were the produce of the sale of real estates seized under an extent at the instance of the crown. — *Eden*.

should be paid. (8) (b) The ground from compassion is too loose and indistinct. The reasons for giving interest cannot turn on the fact whether the party was or was not in distress. The annuity being intended as a maintenance is not, in all cases, a ground for its carrying interest. To take up the consideration in that way would be too much. (c) Where trustees were bound to make regular payments, and have kept money in hand, the Court has given interest. (9)

*His Lordship ordered the arrears of the annuity to be paid out [*496] of the personal estate, as far as it would go, and the deficiency to be made good out of the settled estates, out of which the defendant would have been entitled to dower, if she had not accepted the annuity. (d)

(8) See note (2) *ante*, 489, and 1 Roper on Bar. & Feme, 462, 463.

(9) And so where the widow was prevented from enforcing the due payment at law by an injunction in a suit in equity. *Morgan v. Morgan*, coram Lord Thurlow, 2 Dick. 643.

(b) See *Lind v. Donegall*, Lloyd & G. Temp. Plunk. 227; *Clayton v. Lord Glengall*, 1 Con. & Law, 311; S. C. 1 Dru. & War. 1.

(c) The Court will not give interest upon the arrears of an annuity, unless a special case be made. *Booth v. Leicester*, 1 Keen, 247. See *Hyde v. Price*, 8 Sim. 578; 2 Williams, Ex. Pt. 3, B. 3, ch. 4, § 6, p. 879; *Ram on Assets*, ch. 7, § 5, p. 138.

(d) See 1 Madd. Ch. Pr. (4th Am. ed.) 585; 2 Story, Eq. Jur. ch. 33, § 1249.

KNIGHT v. MACLEAN. 16th March.

(No entry on this occasion.)

The Master in computing interest on a bond, is not to go beyond the penalty. (1)

RICHARD GLOVER, of Croydon, entered into a bond to Richard Glover, of Woldingham, bearing date 20th of November, 1749, in the penalty of 2800*l.* conditioned for the payment of 1400*l.* on the 20th of November, then next, with lawful interest.

This bond-debt being unpaid, and a bill being filed for accounts of the estate, &c., of Richard Glover, of Croydon, by decree in the original suit, such accounts were directed to be taken.

The Master, by his general report, dated 15th of May, 1790, stated the bond, and that he had allowed the penalty thereof.

Exceptions were taken to the Master's report, the second of which went (*inter alia*) to the Master having allowed only the penalty of the bond.

These exceptions came on to be argued on the 24th of November, 1790, before Mr. Justice Buller, then sitting for the Lord Chancellor, when,

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Short*, for the executors, contended, that the Master ought to have calculated the full interest down to the present time, and not to have restrained himself to the penalty. That there is no rule to this effect in the books, and that although the practice has been so, it arose from a conformity to the rule of the courts of common law, but that even there the rule has become obsolete, and the jury now will, in the shape of damages, give the full interest. That in the present case, the Master had calculated the full interest on notes of hand, so that interest was given on simple contract debts, but *stop- [*497]

(1) See the preceding case of *Tew v. E. of Winterton*, and the Editor's notes (1) and (a) to p. 489, and (5), p. 492.

ped on a specialty. They cited Lord *Lonsdale v. Church*, 2 Term Rep. 388, Bunb. 23, *Duval v. Terrey*, Shower's Parl. Cases, 15; 1 Salk. 154.

Mr. *Solicitor-General*, and Mr. *Skuter*, on the other side, contended, that it was always the practice of the Master's office to restrain the calculation of interest to the penalty of the bond. That it would be difficult to argue, that if a court at law gave further interest, that a court of equity should not do the same; but that at law it was given in the shape of damages, and the Master could never calculate damages. That the only case where interest was extended beyond the penalty was, where the debtor was plaintiff, which was the case in Shower, but where the creditor was plaintiff it was never done. *Hale v. Thomas*, 1 Vern. 349. If the practice of the Court is to be changed, it should be by decree, not in the Master's office.

Mr. Justice *Buller*, immediately after the argument, said—

The question is, whether the Master ought not to calculate the whole interest due, without stopping at the penalty.

The direction is, to calculate interest down to the time, and that direction the Master ought to follow, and calculate the interest to the time of the report. (a)

There may be cases, that say the interest shall only be to the amount of the penalty; but they are very old cases, and were determined in conformity to the rule of law.

But it is now held otherwise, even there. I remember a case in the year 1765, in the King's Bench, where it was held otherwise, and Lord Mansfield cited a case at *Nisi Prius*, where Mr. Justice Wright directed the jury to find damages beyond the penalty. The case of *Wright v. Sealy*, Dougl. 48, was determined on the ground of its being the case of a surety, who never could be held to have intended to bind himself beyond the extent of the penalty, but the exception proves the general rule to be otherwise. Then, if it be so at law, where is the equity to prevent it being so here? Will a court of equity narrow the remedy of creditors, whom in general it favors more than a court at law does?

[*498] *The second exception was therefore allowed, so far as the same went to the Master's not allowing interest beyond the penalty of the bond.

The exceptants being dissatisfied with this order, preferred their petition to the Lord Chancellor, praying that the exceptions might be reargued, which being ordered, they came on for that purpose, 18th of March, 1791.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Abbot*, supported the exceptions.

In every case except this, the sum in the condition of the bond is considered as the real debt. There is no distinction between a bond for payment of money, or for securing the performance of a collateral act: now it is settled, that a man cannot pay the penalty of a bond in discharge of an obligation, to settle an estate to certain uses, though in that case it is an agreement to do a thing, the performance whereof is secured by the penalty. *Hobson v. Trevor*, 2 Wms. 191; *Earl of Lonsdale v. Church*, 2 Term Rep. 388. So it appears by Godolphin, 70, that, in the question as to *bona notabilia*, the sum in the condition, not the penalty, is considered as the debt. So in a deed with a penalty for performance of cove-

(a) Acc. *Pitts v. Tilden*, 2 Mass. 118; *Harris v. Clap*, 1 Mass. 308, and the other American cases cited in note (a), to *Tew v. Winterton*, ante, 489.

nants, or for payment of money by instalments, the party may bring debt before the instalments become due, and is not confined to the penalty. The cases where the penalty has been considered as the utmost sum to be recovered were so determined, in order to follow the practice of the courts of law. They are old cases, and the reason has ceased, as it is now established by precedent, that interest may be given, even at law, beyond the penalty. When this was on before, a case was cited in which Mr. Justice Wright had directed the jury to find to the extent of the interest due, and that case was afterwards approved by the Court; a difficulty may arise on that practice there, for if a man owed A. 100*l.* and B. 100*l.* on bond, and A. recovered judgment for 100*l.* debt, and 100*l.* damages, though the judgment is entire, the 100*l.* damages could not be set on the same footing with B.'s bond debt. But, in modern cases in equity, interest has been given beyond the penalty: it was so in the case reported, Shower's P. C. 15, and though there are some *par- [*499] ticular circumstances mentioned in the close of that case, as grounds for affirming the decree, yet it seems as if the reasons proceeded on the general ground. The general doctrine seems to have been first fixed in *Hale v. Thomas*, 1 Vern. 349. Lord Cowper, in 1707, considered the case as clear. In 1718, there is a case to the same effect reported by Bunbury, p. 23. So in 1 Eq. Abr. 288, referring to Salk. 154. There have been several subsequent cases to the same effect, *Godfrey v. Watson*, 3 Atk. 517, some of them in the House of Lords (as was that reported by Shower), also Lord *Dunsany v. Plunket*, 2 Brown's P. C. 251; *Kirwane v. Blake*, *ibid.* 333; *Corporation of Galway v. Russel*, *ibid.* 275. A court of equity looks upon the bond as an agreement, even where there is no debt, *Acton v. Pierce*, 2 Vern. 480; *Cannel v. Buckle*, 2 Wms. 342, where the Court could not confine itself to the penalty, because the bond was void at law. In *Bishop v. Church*, 2 Vesey, 100, 371, the penalty was gone at law, but relief given in equity. Now there is no principle upon which the Court can give relief upon an instrument void at law without giving it to the full extent of the debt. There would be many cases of great hardship if the creditor was tied down to the penalty, as in the case where assets fall in at a great distance of time. In the present case no diligence could have obtained payment, for there were no assets for many years. The principle is, that the Court will look to the real debt, not to the penalty by which that debt is secured.

Mr. *Mitford*, in support of the Master's report, said, that the case of Lord *Lonsdale v. Church* would not be found to be a decision on the subject. The rule under which the Master has acted is clearly established, both at law and in equity; courts of equity have recognized the rule, and considered themselves as bound by it, except in cases where fraud has intervened, or the parties have submitted, as was the case of *Duval v. Terrey*. The case of *Elliot v. Davis* is very shortly stated in Bunbury. In that of *Holdipp v. Otway*, 2 Saund. 106, the Court thought that upon a single bill obligatory, interest might be given in the shape of damages. In Lord *Dunsany v. Plunket*, the party was in possession, and the plaintiff came to be relieved against that possession, and the Court imposed the terms of paying the interest due. The case was the same in *Godfrey v. Watson*; *Kirwane v. Blake*, proceeded on the fraudulent conduct of the party. On *the general ground there is a very strong case, [*500] *Bromley v. Goodere*, 1 Atk. 75, against carrying interest further than the penalty.

Lord CHANCELLOR (during the argument) threw out great doubts as to

the nature of the debt, and order of payment of the interest *ultra* the penalty (supposing the penalty not to be the debt); whether it would be a debt by specialty, or by simple contract, and ordered the matter to stand over for judgment. (2)

But before any judgment actually given in this cause, the preceding case of *Tew v. Lord Winterton* came on, in which the same point was agitated, and Lord Chancellor, having satisfied his judgment on the subject, ordered the exceptions in the present case to be

Overruled.

(2) The following is Sir J. Simeon's note of Lord Thurlow's observations on this first occasion, March 17, 1791. —

"Lord Thurlow. — If it be universally the rule at law to carry interest beyond the penalty, it must be so against the heir and executors and S. C. creditor. And yet the penalty is the debt at law, and always so considered. If so, how can anything beyond charge the heir or executor? Can damages on the *debt* be recovered beyond his own time? One shilling damages entered on verdict for the penalty are *pro forma* only, because, there being an injury, damages are in notion of law sustained; so in judgment by default, &c. If interest be calculated, and judgment taken against executor beyond the penalty, shall the excess be paid as a specialty, and exclude other specialty creditors? The law certainly was considered as clear, by Lord Macclesfield and Lord Hardwicke, that you could not go beyond the penalty; and the decisions of equity have been uniformly on the same principle: the cases cited are exceptions allowed. His Lordship doubted whether he could determine the point on these exceptions; and on the 19th Lord Thurlow said he should choose to have the matter settled at law before he decided.

Adjourned."

From Sir J. Simeon's MS. notes.

Ex parte **SALTER.** [Vide S. C. 2 Dick. 769.] Rolls, 16th March.

(Reg. Lib. 1791. B. fol. 253.)

Guardian may be appointed, and maintenance allowed, upon petition without suit. (1) The costs of the petition are to be allowed to the guardian in his accounts.

UPON the petition day before Michaelmas term, this petition came on, praying for a guardian and maintenance, on behalf of an infant, and for a receiver, (2) but without any suit in Court.

Mr. *Abbot*, for the petitioner, cited *Ex parte* Kent, June 15th, 1790, where the like order had been made (ante, 88), upon authority of *Ex parte* Whitfield, 2 Atk. 315, and prayed that the Master might also tax the costs of this petition, on authority of *Ex parte* Thomas, Amb. 146.

The Chancellor thought with Lord Hardwicke, in 2 Atk. 315, that no receiver could be granted; but he also doubted the propriety of having the costs taxed, though so reported in Ambler. He ordered the guardian and maintenance.

Afterwards Mr. Dickens, the register, drew up the order, but would not deliver it out, and stated to the Chancellor, that maintenance ought not to be ordered, without a suit to bring the fund into Court; and [*501] that though the practice had been so *formerly, yet when Lord Kenyon was Master of the Rolls it had been discontinued. It was directed to be mentioned again.

(1) The above report is from the notes of Lord Colchester, who was the counsel in this case. The practice was quite settled by this decision, upon the authorities within mentioned. See the previous doubts stated by Mr. Dickens, the Reg. 2 Dick. 769, &c. See further, *O'Keefe v. Casey*, 1 Scho. & Lefroy, 106, and *Ex parte* Myerscough, 1 Jacob and Walker's Rep. 151, &c.

(2) The Court refused the application for a receiver, agreeably to 2 Atk. 315.

In the course of the term, Mr. Abbot renewed his application, and cited the following precedents, which the Chancellor desired might be laid before him.

The first instance of a guardian appointed on petition, without bill, is said to have been in 1696, in the case of Hampden, Harg. Co. Litt. fo. 131, *notis*. But this order does not appear upon the Register's Book.

Ex parte Dacre Barrett Lennard, (Reg. Lib. A. fo. 85. Anno 1723.) Maintenance ordered by Lord Macclesfield.

The order for maintenance (as well as upon the right of guardianship) affirmed by the House of Lords, 1724. 2 Bro. Parl. Cas. 539, *Lady Teynham v. Lennard*. [But see the note 1 Jac. & Walk. 152.]

Lord Hardwicke, speaking of this case says, "Here is a precedent in point, where maintenance has been allowed upon the authority of Lord Macclesfield, and the House of Lords, notwithstanding there was no cause depending." 2 Atk. 316.

Ex parte Odel, 1731. Maintenance ordered by Sir Joseph Jekyll, cited in 2 Atk. 315, but does not appear upon the Register's Book. In this case it is said a receiver was also appointed. [Sed Quære de hoc. Et vide 3 Atk. 315.]

Ex parte Peploe, (Reg. Lib. B. fo. 436, Anno 1733.) Maintenance ordered by Sir Joseph Jekyll. In this case, also, a receiver was appointed.

Ex parte Whitfield, (2) (Reg. Lib. B. fo. 391. Anno 1741.) Maintenance ordered by Lord Hardwicke.

The judgment of the Court, with the reason and authorities upon which this sort of order is founded, is reported at length. 2 Atk. 315.

*Ex parte Thomas, (3) (Reg. Lib. B. fo. 391. Anno 1751.) [*502] Maintenance ordered by Lord Hardwicke. This case is reported, Ambler 146.

Ex parte Kent, (Reg. Lib. A. fo. 445. Anno 1789.) Maintenance ordered. (ante, 88.) Also in the latter case the guardian was ordered to enter into a recognizance.

December 17th. At the last seal, this was again mentioned, when the Chancellor said, he thought the practice was too old and established to

(2) The form of the Order is thus stated in Lord Colchester's notes. —

"Ex parte Whitfield, E. T. 1742. — Petition reciting former petition, and an order that Thomas Willis, clerk, should be appointed guardian of her person and estates, and reference to the Master, to see what was proper to be allowed for her maintenance and education for time past and to come, and to state the same to the Court.

"Reciting also the report of maintenance for time past and to come.

"Praying that the report might be confirmed; that the sum of £. might be allowed for maintenance, &c., due from time past and to come, according to the report; and that it might be referred to the Master to tax her solicitor's bill of fees and disbursements in this matter; and that what should be reported due to him thereon, might be paid by the said guardian out of the petitioner's said estates.

"Order, W. the guardian consenting. Report confirmed. The maintenance to be paid from time to time, according to the report. And that W. the guardian do pay unto petitioner the costs of these applications out of the infant's estates, to be taxed by the Master."

(3) Lord Colchester's notes state the substance of that case and form of the order thus: —

"Ex parte Thomas. — Petition reciting former petition and order, that T. G. should be appointed guardian of the petitioner's person and estates, and reference as to maintenance for time past and to come.

"Reciting report thereon.

"Praying that the report might be confirmed, and that it might be referred to the Master to settle and tax the costs of the petitioner, and T. G. his guardian, in this matter.

"Order, report to be confirmed; several sums allowed for maintenance to be allowed and paid according to the report, and for the time to come to be paid to his said guardian, during such time as he shall maintain him. And it is further ordered, that the said Master do tax the costs of this and the former applications, and that such costs be allowed to the said T. G., the said infant's guardian, upon his account."

be now altered ; also that in many instances it was highly convenient, and he directed the order to be issued. (4) (a)

March 16th, 1792. This matter came on again before the Master of the Rolls, upon petition, to confirm the report, and to have the costs taxed according to the form of the order in *Ex parte Thomas*.

Mr. Abbot, for the petitioner.

Ordered. (b)

(4) The Court, however, in the principal case, being contrary to practice, did not grant a receiver. See 2 Atk. 315. Lord Colchester's notes state that the order made in the principal case was to this effect :—

"That it be referred to Mr. Ord, one of the Masters of this Court, to approve of a proper person, to be appointed guardian of the person and estates of the petitioner during his minority : and the said Master is to inquire who hath maintained the petitioner since the death of the said testatrix, and to consider whether anything, and what is proper to be allowed for the maintenance and education of the petitioner for the time past, since the death of the said testatrix, and for the time to come, and out of what fund it ought to be paid ; and the said Master is to state the same, with his opinion thereon, to the Court, and thereupon such former order shall be made as shall be just."

(a) 1 Madd. Ch. Pr. (4th Am. edit.) 336, 337, 342 ; 1 Smith, Ch. Pr. (Am. edit.) ch. 21, p. 653, et seq.

(b) 1 Madd. Ch. Pr. (4th Am. edit.) 337, 342.

Ex parte Cockshott, in the Matter of JOHN RIDEHALGUE, a Bankrupt.

Lincoln's-Inn-Hall, 23d March.

[A fraudulent] surrender of a copyhold estate not an act of bankruptcy under 1 Ja. 1, c. 15 s. 2. (1) Where there is a bond of indemnity, [the condition of which had been broken, and the penalty absolute at law,] and the petitioners have paid part before bankruptcy, and part after, they may prove the whole. (2)

THE prayer of this petition was, that the petitioners might be admitted creditors, and to prove a debt of 327*l.* 5*s.* 10*d.* under the commission, and for that purpose stated.

That by a bond, dated 25th of May, 1785, petitioners, together with Lawrence Ridehalgue, became jointly and severally bound to Gabriel Wilkinson, in the penalty of 600*l.* conditioned for payment of 300*l.* and interest, on or before the 20th of May, 1786.

That by a bond of indemnity, executed by said Lawrence, and the bankrupt, dated 18th June, 1785, Lawrence and the bankrupt became jointly and severally bound to the petitioners (among other things), to indemnify the petitioners from the payment of said 300*l.* and interest, secured by the said bond.

(1) The grounds relied upon by the Lord Chancellor were, that the creditors could not be defeated or delayed, &c., within the words of the statute, since copyholds were not liable to any process which they could issue against the bankrupt's property. See the judgment, *postea*. Mr. Christian questions this decision ; observing that the word "conveyance," so deliberately used in the statute, should, in his opinion, comprehend it ; and that if the reasoning adopted here "were to prevail, a fraudulent assignment of debts, or of money in the funds, would not be an act of bankruptcy." As to the former, viz. "debts," Mr. Christian refers to *Ex parte Richardson*, 14 Ves. 186. See 1 Christ. B. L. 150, 151. As to money in the funds, the objection does not seem to assist Mr. Christian's argument ; since no decision is brought forward to support such a proposition, as that an act of bankruptcy could be supported upon such a transfer.

(2) See, accordingly, *Hodgson v. Bell*, 7 T. R. 97, and the late alteration by Sir S. Romilly's Act, 49 Geo. 3, c. 121, s. 8, whereby sureties who have paid any debt after a commission, where the creditor has not proved, may themselves prove to that amount ; and, where the creditor has proved, may stand in his place.

*That about the 30th of January, 1790, the petitioners paid to [*503] Wilkinson 118*l.* 2*s.* 6*d.*, and about April, the petitioners paid him 209*l.* 3*s.* 4*d.*, making together 327*l.* 5*s.* 10*d.* for the principal and interest then due to him on the bond.

That on the 23d February, 1790, a commission issued against John Ridehalgue.

That on the 15th December, 1790, the petitioners applied to the major part of the commissioners, to be admitted to prove their debt of 327*l.* 5*s.* 10*d.* but were refused — and a dividend of 6*s.* 8*d.* in the pound had been made.

Mr. *Coke*, in support of the petition, said, the alleged reason for the commissioners' refusal of the prayer of the petitioner's debt, was, that the bankrupt had committed a previous act of bankruptcy, by surrender of a copyhold estate to one of his creditors, to give him an unfair preference, but that it had been held by Lord Mansfield, in *Martin v. Pecwtress* and *Robarts*, 4 Burr, 2477, that an assignment, in order to be within the clause of the 1 Ja. 1, c. 15, s. 2, must be by deed — that was a case of goods bought by the bankrupt on credit, and given up to the creditor, for the purpose of an unfair preference, and not being a conveyance by deed was not an act of bankruptcy; that so the present case being by a surrender, though a fraud, was not an act of bankruptcy.

He also contended, that the petitioner had a right to prove both the sums paid. That the condition being broken, and the bond forfeited at law, the petitioners had a right to prove all they had paid under it.

Mr. *Mitford*, on the other side, said it had been held that copyhold estates were within the bankrupt laws; and, therefore, a surrender of such estate would be within the clause as an act of bankruptcy.

He also contended, that, though, it was true, under an annuity bond forfeited at law, you had a right to prove the whole, it was not so under a bond of indemnity.

*Lord CHANCELLOR thought, that, in order to be within the [*504] words in the statute "make any fraudulent grant or conveyance of his, her, or their lands, &c. whereby his creditors shall be defeated or delayed for the recovery of their just debts," the conveyance must be such as would defeat or delay the creditors in recovering at law; and therefore could not extend to this case, the copyhold being neither liable to a *fiery facias*, or an *elegit*; therefore it is a conveyance of that which the creditors could not get hold of. (3)

And that, as, if there had been no bond of indemnity, the petitioners' having paid the money on account of the bankrupt, might have brought an action, so, there being a bond, they would recover upon it; and the condition of the bond being broken before the bankruptcy, they had a right to prove the whole of what they had paid.

He therefore granted the whole prayer of the petition.

(3) An extent from the crown will not affect copyholds. See per Lord Hardwicke C. 1 Atk. 96.

Ex parte HANKEY, in the Matter of MILLS and SWANSTON,
Bankrupts.

[See the order in this matter affirmed by Lord Loughborough C. 2 Ves. jun. 295.]
Lincoln's-Inn-Hall, 24th March.

There being a surplus of a bankrupt's estate, interest allowed to be proved on the bankrupt's notes, [although not drawn payable with interest where interest had been allowed between the parties upon such securities in the course of their accounts.] (1)

THIS was a petition in the same bankruptcy with that, *Ex parte Champion*, reported ante, p. 463; it prayed that the commissioners might be ordered to compute interest on the sum of 11,345*l.* 5*s.* 1*d.* proved by the petitioners, against the estate of the bankrupts, and that the same might be paid to the petitioners. It stated that the petitioners are bankers, that the bankrupts employed them as such, that bankers in London frequently assist their employers by temporary loans of money, and that such loans carry an interest at the rate of 5*l.* per cent., and that it has for a great number of years been a custom well known and established in the city of London, that bankers have a right to charge, and actually do charge, their employers interest on such loans, whether any previous agreement is made for that purpose or not, and such loans are made on the faith of such custom, and with full knowledge thereof; and that it is the custom of merchants, and particularly of West India merchants, to charge their correspondents interest for moneys in advance, and for extraordinary credit on goods supplied.

[*505] *That in and previous to 1772, the petitioners lent the bankrupts different sums of money, and paid their drafts beyond the amount of their cash in hand, and charged interest, and were allowed and paid the same by the bankrupts.

That, on the 9th of December, 1772, the petitioners lent the bankrupts 3000*l.*, for which the bankrupts gave a promissory note in the following terms: "We promise to pay on demand to Messrs. Hankeys and Co. 3000*l.* for value received."

On the 1st of January, 1773, the petitioners lent the bankrupts the further sum of 3000*l.* on a similar note.

On the 18th of March, 1773, the petitioners lent the bankrupts 4000*l.* on a similar note.

On the 21st of July, 1775, the petitioners lent the bankrupts the further sum of 3000*l.* on a promissory note, in these terms: "We promise to pay Messrs. Hankeys and Co. 3000*l.* with interest for the same at the rate of 5*l.* per cent, per annum."

That the said sums, making together 13,000*l.*, were actually lent and advanced by the petitioners, to the bankrupts, at interest at the rate of 5*l.* per cent. per annum, and that the petitioners, having previous to the month of January, 1776, received of the bankrupts several sums of money on account of the interest accrued on the said debt, made up an account of the same, in their books, amounting to 567*l.* 8*s.*, which was charged in their accounts with the bankrupts, and allowed by them, and that the bankrupts kept a bank-book, in which the sums accrued due for interest since, were likewise entered. It then stated the bankruptcy, and that the petitioners, having charged the bankrupts with

(1) The order in this matter was affirmed by Lord Loughborough C. *Ex parte Mills*, 2 Ves. jun. 295; Et vide *Ex parte Morris*, and *Ex parte Champion*, S. P. ante, 79, & 436.

45*l.* 11*d.* for the balance of interest on the said sum of 13,000*l.* to the time of the date of the commission, they had still in their hands two sums of money belonging to the bankrupts, amounting to 1654*l.* 14*s.* 11*d.*, and the petitioners being entitled to deduct the same out of 13,000*l.* there remained due to the petitioners from the bankrupts, 11,345*l.* 5*s.* 1*d.*, and one of the petitioners proved the said debt against the bankrupts' estate.

*The petition then stated that there was a surplus, and the peti- [*506] tion of Morris, with the order, and an application to the commissioners, and their refusal to admit the same, as stated in the petition *Ex parte Champion*, and prayed as above.

The petition came on immediately after that, on the 4th of February last, but it was suggested that a copy of it ought to have been served on W. Swanston, the surviving partner, as being interested in the surplus. It therefore stood over for that purpose, and he having been served, it came on now.

It was admitted that the three notes, which did not express interest, were drawn by W. Swanston, who was cashier of the house, and that which expressed interest, by a young partner in the house, who had never been used to conduct that part of the business.

Mr. *Mansfield*, and Mr. *Hollist*, contended, that the petitioners were entitled to interest on their debt. That it is the custom of bankers to charge interest on sums advanced in this way to their customers. That this was allowed in the case *Ex parte Champion*, to another creditor. The only objection made, is, that interest, in such cases, is given by a jury as damages. It is a debt that carries interest in its own nature, and therefore it was unnecessary that interest should be mentioned on the face of the note. The notes are payable on demand. Both the acts relative to protests, that of King William and that of Queen Anne, direct interest to be paid. In this case, an agreement for five per cent. interest is sworn to by the petitioner Hankey, so that the express contract was lending money at interest. In *Robinson v. Bland*, 2 Burr. 1077, interest was given, though not expressed in the note: and Lord *Mansfield* said, it was due, both at law and in equity. And lately the Common Pleas have given interest upon money advanced for the defendant's use.

Mr. *Solicitor-General*, and Mr. *Mitford*, on the other side.

The question turns on the nature of the contract made with the Hankeys. They had four bills, and now contend that the effect of the bills which do not express interest, is the same with that of the one that does. They state that interest is due *by law, because there is a [*507] custom of bankers, to charge persons with whom they deal in this way with interest, and that books were kept between them and the bankrupts, in which interest was entered and allowed. It is too late, since the case of Sir Stephen Evance's creditors, to contest the power of the Court to give interest on a bankrupt's debts where there is a surplus; though it is difficult to trace such power from the clauses in the acts of Parliament: but the Court will not go beyond what was done in that case. There bond debts bore interest to the extent of the penalty; notes expressly reserving interest to the full extent of the interest due; but no debt was ordered to carry interest for which interest would have been given by a jury only as damages: not upon notes not reserving interest, though there had been a demand: because there at law the interest could only have been given as damages. In the case determined (*Ex parte Champion*), it was upon contract, and the petitioners might have claimed the interest under the com-

mission. There the goods were sold, on a contract that they should be paid for at a future day. Some doubt may be entertained on that case, because, where goods are so sold, and an action is brought for the value, the interest is always given as damages. Though there be a custom of bankers to charge interest; if an action had been brought on the three bills, the interest would have been given as damages; and if any part of it had been paid, it would have been deducted as so much paid of the damages; and if they could recover it only as damages, the Court will not order it to be paid in bankruptcy, as that which can be recovered only as damages cannot be proved under a commission; the usage of bankers to charge interest, has not been considered as the same thing as a contract to pay interest; and they have never attempted to prove the interest of the said debts under bankruptcies.

Lord CHANCELLOR (2) (during, and at the close of the argument) said, he thought the interest due by contract; at least, it became so after it was paid the first time; (a) that then it was a contract for forbearance, and payments would be payments on that contract for forbearance. If sued upon before any payment, the plaintiff could only have the interest in the shape of damages; but if the party has once contracted to pay the interest at such a rate for forbearance, it then is a debt by contract. Pay- [*508] ment of a sum *for interest would not be a liquidation of the debt, but a contract for future forbearance; and therefore as long as the money is forborne, so long the same rate of interest shall be allowed. (b)

His Lordship therefore made the order, that the petitioners be admitted to prove the interest.

(2) Sir J. Simeon's notes state Lord Thurlow's observations thus:—

"Lord Chancellor said the charge in the account was for interest; which shut out the inference contended for; and that it was for forbearance of suit. His Lordship confirming the doctrine held in *Ex parte Champion* (antea, 436, &c.), granted the petition; saying, also, that 'the alleged custom of merchants he did not understand; nor did he decide upon any such thing; but upon the implied contract between the parties in that particular case.'"

(a) *Ex parte Champion*, ante, 439, note (a); *Ex parte Mills*, 2 Ves. jun. 295; *Hovenden's* note, 1 vol. Supp. 264.

(b) See *Ex parte Champion*, ante, 436, and the cases cited in the notes; *Ex parte Mills*, 2 Ves. jun. 295, and *Hovenden's* note to that case.

THOMAS v. DAWKIN.

[S. C. 1 Ves. jun. 452.] Lincoln's-Inn-Hall; 20th April.

(Reg. Lib. 1791. B. fol. 145. b.)

Exception will not lie to a Master's report of the appointment of a receiver, without showing that the person appointed is improper. (1)

AN exception taken to the Master's report, of his having appointed John Franklin receiver of the estate of the defendant.

It appeared that the estate, of the value of about 400*l.* a year, was in mortgage to the late Sir Herbert Mackworth for 11,000*l.*, that he was also a judgment creditor for 600*l.*, and that he had, in 1774, been appointed receiver, and since that time had paid off incumbrances (being younger children's fortunes) to the amount of 3500*l.*; that Sir Herbert

(1) Vide *S. P. Creuze v. Bishop of London*, ante, 2 vol. 253, with the Editor's note and references.

having died in the receipt of the rents and profits, and having appointed Lady Mackworth his executrix, it became necessary to appoint another receiver.

The defendant, Mary Dawkins, is entitled to the estate, subject to the incumbrances.

Upon the reference to the Master, to appoint a receiver, Miss Dawkins recommended John Franklin to be receiver, Lady Mackworth recommended John Morgan, Esq. of Swansea com. Glamorgan. The Master appointed Mr. Franklin, and had reported that he had done so.

To this report, Lady Mackworth took the present exception, stating, that "she proposed, and was desirous that John Morgan, who lives near and contiguous to the said estates, or the greatest part thereof, should be appointed receiver; the said exceptant having a great trust and confidence in him, and believing that he would do his utmost for increasing and improving the estate: and for that this exceptant hath not the same knowledge of, and confidence in, John Franklin, who hath been appointed by the *Master, and for that he lives remote from the said [*509] estates, or the greatest part thereof, for which reasons, she prayed that the appointment might be set aside, and the said John Morgan appointed receiver."

Lord CHANCELLOR, upon the exception coming on, asked whether this was a case for an exception; that he had understood the rule to be, that where a report required confirmation, there the party might except to it; but that in the case of appointing receivers, guardians, or maintenance,† where the report never comes to be confirmed, there it is uncommon to except. (a)

Mr. Lloyd, in support of the exception, stated Lady Mackworth's interest, and that she, by bringing an ejectment, could, as mortgagee, enter into possession and appoint her own receiver.

Mr. Mitford, on the other side, said, that it was laid down as a principle, that such exception would not lie, unless it was shown, which is not pretended in the present case, that the person appointed by the Master was an improper person. This principle was laid down and proceeded upon in *Mitchel v. Hunter* (*Cruze v. The Bishop of London*, ante, vol. ii. p. 253), where Lord Kenyon had referred the matter back to the Master to state reasons, and his Lordship, on the matter coming on again, had thought the Master had done right.

Lord CHANCELLOR thought Mr. Mitford right, and said, the principle he went on was, that small discussions as to who should be receiver, and have the allowance, were not proper questions for him; where a Master has made a report of a receiver, in order to remove him, you should show, that he is an improper person for the purpose. In the present case, the estate is liable to an unascertained charge to the Mackworth family. The interest of the owner of the equity of redemption seems fully equal to the other. And there is no danger of the mortgagee losing her money: under these circumstances, there is no reason to set aside the Master's report. (b)

The exception was therefore overruled. But it being alleged that this might induce Lady Mackworth to bring her ejectment, and to take

† Vide antea, vol. i. p. 577, *Ex parte Nicholls*.

(a) See next note.

(b) See *Tharpe v. Tharpe*, 12 Ves. 317; *Matter of the Eagle Iron Works*, 8 Paige, 388; 1 Barbour, Ch. Pr. B. 3, ch. 7, § 2; *Thomas v. Dawkin*, 1 Ves. jun. 452, and Hovenden's note to that case; 1 Hovenden, Supp. 180; 1 Smith, Ch. Pr. (Am. edit.) 635, 636; 2 Madd. Ch. Pr. (4th Am. edit.) 238, 496.

possession of the estate, it was ordered, by consent, that the receiver should, out of the first rents, keep down the interest of the incumbrances.

[*510]

*EASTER TERM.

32 Geo. 3. 1792.

DIXON v. DIXON. Rolls, 26th April.

(Reg. Lib. 1791. A. fol. 315.)

Presumption of death of legatee [after twenty-seven years without any intelligence about him; but when the Court makes a reference to the Master in any such instance, it expects the Master to draw a conclusion, and not to rest content with a bare statement of facts.] (1)

A LEGATEE having been abroad twenty-eight years, and not having been heard of for twenty-seven years past, his Honor said he would presume him to be dead. (2) (a)

(1) In this case, the Master had merely stated certain facts, under an order directing him to inquire whether the party were living or dead. His report certified that the individual had gone to sea about twenty-eight years from the time of his report; and that he had been heard of as being in the East Indies, in an ill state of health, about a year afterwards; since when there had been no intelligence of him. Sir P. Arden, M. R., referred it to the Master, to review his report by drawing a conclusion from those facts; which he accordingly did, by stating his opinion that he had died, *ut supra*, in the testator's lifetime, R. L. Lord Eldon C. approved this course, and made a similar reference, back to the Master, under like circumstances, in *Lee v. Willock*, 6 Ves. 605.

(2) These instances depend upon their peculiar circumstances. In *Mainwaring v. Baxter*, 5 Ves. 453, a party was presumed to be dead after an absence of sixteen years without any tidings of her. In *Bailey v. Hammond*, 7 Ves. 590. The like after twenty years; but security was taken there to refund in case of a claim. Where a fact is doubtful, and the parties wish it, the Court will direct an issue. *Mason v. Mason*, 1 Merivale, 308.

(a) Where no account can be given of the existence of a person, the presumption of the duration of life ceases at the expiration of seven years from the time when he was last known to be living. 1 Phil. Ev. (Cowen & Hill's edit.) 197, and note, 381, to 2 vol. Cowen & Hill's notes, 489; 2 Stephens, N. P. 1555, 1556; 1 Greenl. Ev. Pt. 1, ch. 4, § 41; *King v. Paddock*, 18 Johns. 141. See *In re Hutton*, 1 Curt. 595; *M'Comb v. Wright*, 5 John. Ch. 263; *Doe v. Nepean*, 5 Barn. & Adol. 86; *Battin v. Bigelow*, Peters, C. C. 452.

It is not necessary, that the party be proved to be absent from the United States; it is sufficient, if it appears that he has been absent for seven years, from the particular State of his residence, without having been heard from. *Newman v. Jenkins*, 10 Pick. 515; *Innis v. Campbell*, 1 Rawle, 373; *Spurr v. Trimble*, 1 A. K. Marsh. 278; *Wambough v. Shenk*, 1 Penning. 167; *Woods v. Woods*, 2 Bay. 476.

Ex parte BROMFIELD. †

[Vide S. C. 1 Ves. jun. 453, postea, 4 vol. 231, and 2 Ves. jun. 69, &c.]

Lord Chancellor thought that, notwithstanding the words of the stat. 17 Ed. 2, st. 1, c. 9, 10, the Court has authority to order timber decaying on the estate of a lunatic to be cut; (1) but did not absolutely decide the point, or whether the produce should be considered as real or personal estate, directing the point to be argued on a bill filed. (2)

THIS was a petition of the personal representatives of John Bromfield, Esq. a lunatic (deceased), that the Accountant-General might transfer several sums standing in the public funds in his name to the credit of this account, to them. A part of these funds were purchased with sums of money, the produce of timber cut upon the lunatic's estate, by order of the Court, at the instance of his sister, who was committee of his person and estate; and upon the representation that it was in a state of decay, and damaging other timber, and injuring the soil through that state of decay.

The petition was opposed on the part of the heirs-at-law.

Mr. *Mansfield*, for the heirs-at-law.

*The question is with respect to money produced by sale of [*511] timber cut on the lunatic's estate by order of the Court. The heir-at-law claims this money, on the ground that his right is the same as if the timber had been still standing; in which case it would have descended with the estate to him. That his rights cannot be varied by the circumstance of the timber's being cut, appears from the cases *Ex parte Grimstone*, Amb. 706; and *Tullit v. Tullit*, Amb. 370. In those cases, the timber had been cut without order; here it was cut by order of the Court, and the money produced by the sale paid into the bank. Where such sale is made by order of the Court, it is to be considered on the same foot of property as if it continued timber. This doctrine is laid down by Lord Hardwicke in *Anandale v. Anandale*, 2 Ves. 381. The Court cannot, by its order, change the nature of the property of an infant or lunatic. *Inwood v. Twine*, Amb. 417. (3) Lord Hardwicke (4) there relied on the act of the infant after she came of age, by electing to have it considered as real estate. (4) Besides, there the mother, who was the only next of kin, signed the petition, and consented to the money being invested in the purchase of real estate. There are not many orders to be found, whereby timber has been felled and the property changed. The

† The reporter has not usually admitted cases to appear, which have not received a final judgment, but the importance of the present case upon the practice of the Court in a material instance, and the strong inclination indicated by what fell from Lord Thurlow, induced him to deviate from his accustomed rule.

(1) See, accordingly, *Ex parte Ludlow*, 2 Atk. 407, and the cases cited within, and in 1 & 2 Ves. jun.

(2) The question came on accordingly in 1793; when it was determined that the produce of the timber, cut by order of the Court, was personal estate in the lunatic, and as between his representatives. See the reports of this case on the occasion, under title of *Oxenden v. Lord Compton*, postea, vol. iv. 231, and 2 Ves. jun. 69. The report in Vesey, jun. is much preferable in each instance.

(3) See vide S. C. vol. ii. Lord Northington's MS. Ca. 148.

(4) That case was decided by Lord Northington, and not by Lord Hardwicke; and his Lordship decided it expressly upon the ground of a conversion of the property; though he alluded to the subsequent acts of the infant as amounting to a confirmation, "if there could have been any doubt." Vide 2 Eden, Ca. Lord N. 164, and Ambler, 420. See also per Lord Hardwicke C. in *Sergison v. Sealey*, 2 Atk. 414, and *Ex parte Ludlow*, ibid. 407. The case of lunatics in such instances is similar in principle to that of infants, as observed by Lord Thurlow, postea, 615. As to which latter, see *Ware v. Polhill*, 11 Ves. 257, &c., 274, &c., 278, &c., which comprehends most of the authorities.

first instance we have been able to trace, is in the matter of *Ann Hunt*, a lunatic, where Lord Henley made an order, 13th of March, 1760, upon the petition of the committees, that they should be at liberty to cut down and sell such dead, lopt, and decaying timber as they should be advised as necessary to be taken out, to bring the woods, coppices, and hedge-rows on the lunatic's estate into a proper course of husbandry; and all directions as to the application of the money were reserved. In the case of *Grimstone*, 2d of November, 1771, the timber was cut by the agent, without the order of the Court. In *Calthorpe's case*, 31st of July, 1785, an order was made for felling and sale of timber, and that the produce should be paid into the bank, in trust, to the credit of the matter, under the title of Sir Henry Calthorpe, a lunatic, the timber account. In the matter of *Bevan*, a lunatic, 20th of March, 1771, Lord Apsley ordered the residue of money produced by the sale of timber felled by order of the Court, after payment of costs, to be applied in payment of the lunatic's specialty debts; which must be upon the ground that those debts would fall upon the real estate of the lunatic. The result from all these cases is, [*512] that wherever the timber is cut without order, the nature of the property is not changed. (5) And where it is cut by the order, or with the approbation of the Court, there is no reason why the heir-at-law should not take the produce. In *Shelly's case*, the same person appears to have been heir-at-law and personal representative: at least, the case passed without contest. The only cases, therefore, are those of *Inwood v. Twyne*, and *Ex parte Grimstone*.

Mr. *Solicitor-General*, Mr. *Lloyd*, and Mr. *Mitford*, for the petitioners.

However it may be where the timber is felled without the order of the Court, wherever it is so by order, the produce belongs to the personal estate. There is no case in which the timber has been cut by order, where the Court has sustained the claim of the heir-at-law. In *Tullit v. Tullit*, the mother cut the timber by her own authority, and the produce was considered as real estate: because the guardian did not act by order, and there was no inquiry as to its being for the benefit of the estate. (Lord Chancellor observed, that it appeared, by his note, that that case was against the opinion of the Master of the Rolls.) It is said in that case, that if the infant is tenant in tail, the cutting the timber shall vary his interest, not if he is tenant in fee. If it is for the interest of the infant, the Court will consider the property as changed. The Court will be influenced by the consideration, whether it is or is not for the interest of the infant. The case of *Mason v. Mason*, cited in *Tullit v. Tullit*, only shows that the Court exercises its judgment throughout. The case of *Tullit v. Tullit* itself, is a singular case, because the guardian there had contracted without the authority of the Court, and it did not appear to be for the interest of the infant. It may safely be stated, that the Court will be jealous of permitting the guardian to vary the nature of the property. But here the Court having ordered the timber to be cut, has made it personalty. In *Inwood v. Twyne*, the Court was of opinion, that the infant had acquiesced. It is said the Court can change the nature of

(5) Lord Hardwicke is reported to have expressed his opinion in 1749, as upon a case not then decided, that if timber on an estate were blown down, or cut by a stranger, it would belong to the reversioner in fee, and not to the tenant for life. It seems, however, that the point had been so expressly determined, even before the times of Lord Talbot and Lord Maclesfield; each of which judges had decided it accordingly. See Mr. Cox's note to *Bewick v. Whitfield*, 3 P. W. 267, 268 (5th edit.).

the property by a decree. It certainly can do so, though it will not do it wantonly, and only where it is manifestly for the benefit of the infant. With respect to the cases, in the first, of Ann Hunt,† the money, including that produced by the sale of timber, was ordered [upon the second petition, 20th December, 1777] to be paid to the next of kin.

*In Bevan's case, the order that the money should be applied in [*513] payment of specialty debts, altered the nature of the property between the real and personal representatives, and was as much a conversion as any other. In the case of Grimstone, the agent had cut the timber without order, and it was held, the property was not altered; and the heir-at-law there found it necessary, in order to entitle himself, to state that it was cut without the authority of the Court; and upon the order 8th of August, 1772, it appears that the residue, including the produce of timber, was paid to the next of kin. And your Lordship, in a case *Ex parte Clarke*, 25th of July, 1787, made an order, that the money, including the produce of timber cut by order, should be paid to the next of kin. So in Shelly's case, 1773, there the heir-at-law was ordered to attend; on the hearing of the petition, the Court ordered the money to be paid to the next of kin. In many cases the committee may change the nature of the property, as by applying timber to repairs. *Ex parte Ludlow*, 2 Atk. 407; *Sergison v. Sealy*, 2 Atk. 412. In other cases, the Court has made such alteration, where manifestly for the interest of the infant, as in *Vernon v. Vernon*, where Lord Shipbrooke had given an estate to the infant, which lay intermixed with his own, on condition that the infant should pay as much to his personal estate as he had paid for it. And the price having been paid out of the personal estate of the infant, who died under age, your Lordship was of opinion, that the personal representative had no claim, because the change had been made for the interest of the infant.

Mr. Mansfield's reply.

With respect to the principle, there is no case that shows that timber cut upon the lunatic's estate becomes personalty.

Shelley's case passed entirely without argument, and by consent, the first application was made in the absence of the heir-at-law, and to the second he consented. None of the cases have decided that the produce does not continue in the nature of timber. The case of *Inwood v. Twyne*, was the case of an infant; in that of Grimstone, it was certainly a benefit to the estate. There is nothing in the statute to authorize the application of personal estate to improve the realty. In the other cases cited, there is nothing applicable to this. In *Vernon v. Vernon*, the only question *was, whether an infant could take an estate on condition. [*514] In *Anandale v. Anandale*, Lord Hardwicke clearly means by the word *wrongfully*, all cases where the timber is cut without order of the Court. Except in *Inwood v. Twyne*, there is not a case which even hints that the property can be changed. Then consider what is the authority under which the Court acts. The words of the statute are, that the king shall provide, that the land of the lunatic shall be kept "without waste or destruction." If we consider these words, we shall not wonder that the Court has acted with great delicacy on this subject. The lands are to be kept without waste or destruction, and in nowise to be aliened. The Court has no more right to cut timber, than a tenant for life, impeachable for waste, would have. Such a tenant cannot cut timber if the

† In 1 Ves. 399.

remainder-man chooses to have it stand and rot. If it can be cut, when it is apparent the timber must be cut, it must still be considered as timber, and the heir must succeed to the money. But the lands are not to be *aliened*. To cut the timber is the same as aliening the estate. The timber may constitute its principal value. I mention this, because the power of the crown is very different with respect to infants and lunatics. As to infants, it is part of the power of the crown, as a general guardian : but with respect to lunatics it is a special authority. The case of the lunatic is therefore stronger than that of an infant, against altering the nature of the estate : and it appears from the case of *Inwood v. Twyne*, that even in the case of an infant, the act of the party, without the consent of the Court, will not vary the nature of the property.

Lord CHANCELLOR broke the case to the following effect ;

It appears to me, that the cases cited on this subject deserve more attention than I have been able to give them. If I was only to follow the principles of natural justice, I should find no difficulty : but it is argued that, by the statute, the Court has no authority to act in this manner upon lunatic's estate : and, according to the argument, the Court can, upon no occasion, apply the timber upon the lunatic's estate to the personal use of the lunatic ; so that it cannot apply the timber to the payment of his debts, or even to preserve him from a jail, and this because the statute has said, that their lands shall be kept "without waste or [*515] destruction," and "and shall in nowise be aliened." It is said *that a lunatic, though he has a large estate, is reduced by the statute to the situation of a tenant for life ; but I cannot assimilate (in my mind) the situation of a lunatic with a mere tenant for life. The statute, I think, must be construed to mean, that the lands shall be kept, without destruction, in the same manner that the owner of them would keep them, if he were of sane mind. If this be the true construction of the statute, I cannot distinguish between the case of a lunatic and an infant. (6) (a)

It is extremely clear that, at the time of the death of the lunatic, this money was part of his personal property. It would have been considered as such upon a plea of *plene administravit*. It would have been so for the purpose of paying his debts. It seems difficult to say how the heir-at-law can claim it against his personal representative. I doubt whether he can have any equity to recall it out of his hands ; he cannot do so on any ground, but upon some equity arising from its having been improperly converted into personalty. And probably, if a committee had wantonly, and of his own head, so converted it, the Court might have thought that such a fraudulent management, and breach of the confidence reposed in him, of the lunatic's property, as to raise an equity for the heir-at-law. I think I remember a case where a stranger had cut the timber belonging to the lunatic, and the Court there thought, as there was no breach of confidence, that it was like the case of a windfall, and that no equity arose to the heir-at-law. I think it impossible to say, that where the Court has, for good and substantial reasons, thought proper to change the nature of the property, I have no conception that, in such case, an equity can arise to the heir-at-law. (7) It is perfectly indifferent which way it falls, and,

(6) Vide note (4) *antea*, p. 511 ; especially *Ex parte Ludlow*, and *Sergison v. Sealey*, 2 Atk. 407, 414.

(7) A bill was accordingly filed on behalf of the heir ; but it was dismissed after full consideration of the cases. *Oxenden v. Lord Compton*, *postea*, 4 vol. 231, and 2 Ves. jun. 69, which last report is much preferable.

(a) See as to the distinction, *Eden on Injunct.* (2d edit.) 257 ; *Ex parte Phillips*, 19 Ves. 118 ; *Ex parte Bromfield*, 1 Ves. jun. 453 ; *Hovenden's note*, 1 Supp. to Ves. jun. 182-186.

therefore, he can have no equity to recall it from the personal representative. The Court have thought proper to change the property, and they have done so, on reasons which exclude all hardship from the case of the heir; at the same time I think the Court ought to act with great care, and only in urgent occasions.

If the property, on the present occasion, is sufficiently considerable to afford it, I could wish to decide this in such a way, that, if I am wrong, it can be corrected; if the property is not sufficient to afford a bill, I must decide it in this way; but, in that case, I must consider the cases further. (7)

*I have observed that, where a charge is paid off, or a mortgage [*516] redeemed, with an infant's personal property, it is ordered, that it be considered as personal estate, for the benefit of the infant; (8) but I do not remember any such order made with respect to timber cut on the infant's estate. (b)

(7) See note (7) in the preceding page.

(8) See farther, *Ware v. Polhill*, 11 Ves. 257, 277, 278, &c.

(b) 2 Macpherson on Infants (Lond. edit. 1842), 287, 301-303. See 2 Story, Eq. Jur. ch. 18, § 790, and note at the end of that section; *Oxenden v. Lord Compton*, 4 Bro. C. C. 231; S. C. 2 Ves. jun. 69.

CATHCART v. LEWIS. [S. C. 1 Ves. jun. 463.]

(Reg. Lib. 1791. A. fol. 232.)

Bill stating plaintiffs to be judgment creditors in Jamaica, and that there were prior judgments and a conveyance of the estate to a trustee, for fraudulent purposes; demurrer allowed, because the bill ought to have stated the effect of the judgment in Jamaica.

THE bill stated, that William Lewis, the defendant, was indebted to John Esdaile, and that he brought an action against the defendant, in Jamaica, where the defendant then resided, and, in 1780, obtained judgment against him there; that Esdaile afterwards assigned that judgment to the plaintiffs. It further stated, that the defendant, Lewis, being indebted to the plaintiffs in Jamaica, plaintiffs brought actions there, and recovered judgment, and that the whole debt still remains due. That Lewis, by lease and release, dated in 1784, conveyed his plantations in Jamaica to trustees, who are defendants, in trust to pay him 3000*l.* a year; that William Lewis resides in France; that there are prior judgments to those of plaintiff's. That the defendant, Matthew Lewis, is now in the possession of one quarter of the plantation, upon the trusts of the deed of trust, and that he has large sums of money in his hands belonging to William Lewis; and, therefore, prayed that the defendant, Matthew Lewis, might be decreed to pay to the plaintiffs what is due to them upon their judgments, out of the cash in his hands.

To this bill the defendant put in a general demurrer.

The plaintiffs' counsel not being in court, Lord Chancellor directed Steele, who supported the demurrer, to go on.

He contended there was, on the face of the bill, no equity against the trustee. It only appears that the plaintiffs were judgment creditors, and creditors, by assignment, of judgment creditors of William Lewis.

Mr. Selwyn, for the plaintiffs.

*The trust of the deed is, in the first place, to pay William Lewis [*517]

3000*l.* a year, then to pay certain debts; but there is no provision in the deed to pay the plaintiff's judgment debts, and the defendant is gone abroad. It is stated that the trustee has money in his hands; and as the judgment would be a lien on the land, the produce of the land ought to pay these debts.

Lord CHANCELLOR, at the first opening, thought there was a defect of parties; that the assignors of the judgment ought to be before the Court; (a) but, at the conclusion of the argument, said, that being a judgment in Jamaica, the bill should have shown its legal effect there. If it is the same with that of a judgment here, the lands are open to you, and you may take them by an *elegit*: you say, by your bill, that they are protected by other judgments; but that is no head of equity.

Demurrer allowed.

(a) See *Ray v. Fenwick*, 3 Bro. C. C. 25; Story, Eq. Pl. ch. 4, § 153, 154. As to the proper persons to be made parties in case of an assignment of the matter in controversy, see farther, *Rogers v. Traders Ins. Co.*, 6 Paige, 697; *Field v. Maybee*, 6 Paige, 539; *Trecothick v. Austin*, 4 Mason, 41 - 44; *Millar v. Bear*, 3 Paige, 467; 468; *Whitney v. McKinney*, 7 John. Ch. 144; 2 Madd. Ch. Pr. (4th Am. edit.) 193.

MOGGRIDGE v. THACKWELL and Others.

[Vide S. C. 1 Ves. jun. 464, and on rehearing before Lord Eldon C. 7 Ves. 36.]

(Reg. Lib. 1791. B. fol. 466.)

Gift of residue to J. V. to such charitable uses as he should appoint, recommending poor clergymen, &c. J. V. dies in the lifetime of the testatrix. The charity shall be sustained and executed by the Court. (1) Two codicils, nearly the same (though with a legacy in the one not in the other), held to be explanatory, not duplicative.

ANN CAM, of Battersea, in the county of Surrey, spinster, made her will, dated 16th of June, 1779, and thereby, after disposing of certain real estates, she gave all the rest of her real estates to the plaintiff, John Moggridge, and James Vaston, charged with several annuities; and, among others, with an annuity of 15*l.* per annum to Ellen Pheasant, her late servant; and she also, among other legacies, gave to her servant, George Elliot, 200*l.*, unless otherwise provided for by her in her lifetime; she then gave to the Asylum Hospital 500*l.*, and other pecuniary legacies to charities; and she gave all the rest and residue of her personal estate unto James Vaston, his executors and administrators, desiring him to dispose of the same in such charities as he should think fit, (2) recommending poor clergymen who have large families and good characters, and appointed the said John Moggridge (the plaintiff) and Mr. Vaston before-mentioned, executors; and desired Robert Woodford, Esq., and Mr. Richard Wycherley, to aid and assist her executors.

(1) It was settled by this case, more especially on the rehearing before Lord Eldon C., that where a distinct charitable object is in the terms of it to be executed by trustees, the administration of it, in the event of failure in execution of the trust, will vest in the Court; but that where a charitable purpose is vague and indefinite, and no trust interposed, the direction is in the king, by sign manual. See the report in 7 Ves. 36, &c., *Paice v. Archbishop of Canterbury*, 14 Ves. 364, &c., and *Mills v. Farmer*, 1 Meriv. 55, et seq. Lord Eldon's affirmance of the decree in the principal case, on the above point, was afterwards established in the House of Lords, 13 Ves. 416.

(2) See Lord Eldon C.'s frequent reference to this, as indicating a mere personal trust in Vaston, so as to make it singular upon principle, that the Court should substitute itself, though quite settled upon the authorities, 7 Ves. 68, &c.; 1 Meriv. 99, 100, &c.

The testatrix afterwards made four codicils to her will, dated 12th April and 10th May 1780, and 28th April and 2d May, *1781. [*518] The first of these was in these terms: "A codicil to my last will and testament, which I desire may be taken as a part and parcel thereof: I give to Peter Triquet, Esq., 100*l.*; to William Pollock, Esq., 100*l.*; to Elizabeth Thackwell, eldest daughter of John Thackwell, of the parish of Berrow, in the county of Worcester, 600*l.* three per cents., with the dividends to be accumulated from my death to the time she shall attain the age of twenty-one years; to Robert Woodford, Esq., I give 500*l.*; to Judith, the second daughter, I give the sum of 600*l.* stock, with the interest that shall be accumulated when she attains the age of twenty-one years; and to the four youngest daughters of the said John Thackwell, Margaret, Mary, Sarah, and Nancy, I give 400*l.* each, in stock, with the interest that shall accumulate till they arrive at the age of twenty-one years; and if any die before they attain the age of twenty-one years, then that child or children's portion shall be divided amongst the rest of the other children; to George Elliot I give 100*l.* over and above what I have left him in my will. In witness whereof I have hereunto set my hand and seal, this 12th April, 1780."

The second codicil was in these terms: "A codicil to my will, which I desire may be taken as part and parcel thereof, and I give to Peter Triquet, Esq., 100*l.*; and the same to William Pollock, Esq.; I give to Elizabeth Thackwell, eldest daughter of John Thackwell, of &c., 600*l.* three per cent. bank annuities, consols: and I order my executors to accumulate the dividends thereof for her benefit, and the principal, and such accumulation, to be paid to her on her arrival at the age of twenty-one years; the same to Judith, another daughter on the same terms: and I give 2000*l.* three per cent. bank annuities, consols, to the other daughters of the said John Thackwell, equally to be divided between them as shall be living at the time of my decease, but on the same terms as their other sisters' legacies and accumulations are ordered; but my will is, that if any one of the daughters of the said John Thackwell shall die before their respective attainment of twenty-one years, I order each daughter's legacy, with the accumulations, to be equally divided amongst her surviving sisters; I give to Ellen Pheasant 5*l.* per year, during her life, more than I have given her by my will; and I give to my servant, George Elliot, 100*l.* more than I have given him by will, provided he shall be in my service at the time of my decease. In witness," *&c. The third [*519] codicil was: "I desire, after my death, that, if my servant, George Elliot, likes to continue at Dymocke, he may be retained, with a salary of 50*l.* a year, to do all the business that is to be done in the country, which I think will be of great use to the executors." By the fourth, she desired that George Elliot might have 20*l.* in lieu of what might be owing to him on the face of the books; and that his account might be taken, as she had not the least doubt of his integrity. The first codicil was in the testatrix's handwriting, but interlined by Mr. Woodford, in whose handwriting the second codicil was.

Ann Cam, the testatrix, died 6th February, 1790, without revoking or altering the will otherwise than by the codicils. James Vaston, who was appointed co-executor with the plaintiff (and sole trustee with respect to the charities), died in 1781, nine years before the testatrix (and it was in evidence, that she had early notice of his death), and the plaintiff proved her will, and took upon himself the execution thereof, and possessed the personal estate of the testatrix, to an amount much more than sufficient to pay all her debts, legacies, and funeral expenses.

Doubts arising with respect to this will, particularly with respect to the gift of the residue to Vaston, to dispose of such charities as he should think fit, and the double legacies given to the same persons by the first and second codicils, the executor filed this bill against the legatees, next of kin, and the Attorney-General, praying that the rights of the parties might be ascertained, and for proper directions and indemnity.

The legatees, by their answers, claimed their legacies, and in particular, the defendants, to whom legacies were given by the first and second codicils, claimed both legacies. The next of kin claimed the residue as such; and the Attorney-General put in the common answer.

The cause came on to be argued this term, when

Mr. *Hardinge*, and Mr. *Ainge*, on behalf of the plaintiff, stated the case, and submitted the questions to the Court.

[*520] * Mr. *Attorney-General*, and Mr. *Stanley* (in support of the gift of the residue to charitable purposes) insisted, that notwithstanding Vaston, who was to administer them, was dead in the lifetime of the testatrix, yet there being a general intention to give to charitable purposes, the gift itself was not void; but the appointment had devolved upon the Crown, or upon the Court. To prove this, they cited the case of the *Attorney-General v. Syderfen*, 1 Vern. 224, (3) where the testator charged a manor with 1000*l.* to be applied to such charitable uses as he had by writing under his hand formerly directed, and no such writing was found; (3) the Court decreed the charity to be established, and the appointment to be in the Crown; and the Lord Keeper there cited a case of *Frier v. Peacock*, (4) where the testator devised a surplus for the good of poor people forever, and the charity was established. As the want of the paper was supplied in the case of *Syderfen*, so here the death of the person to appoint shall not defeat the gift. In the *Attorney-General v. Hickman*, 2 Eq. Cas. Abr. 193 [*vide* 7 Ves. 79, 80], it was a gift to B. for the use of non-conforming ministers, at the direction of C. and D. At the death of the testator, B. C. and D. were all dead, yet the Court sustained the legacy. In *White v. White* (ante, vol. i. p. 12), the gift was to such lying-in hospital as his executor should appoint; the testator afterwards struck out the name of the executor, yet the legacy was sustained. In *Doyley v. the Attorney-General*, (5) 4 Viner, 485, plea 16, it was a gift to trustees to certain uses, and subject to them, to dispose of the real and personal estates, to such of testator's relations of the mother's side, who were most deserving, and in such manner as they thought fit; and for such charitable uses and purposes as they should think proper and convenient; one of the trustees declining to act, was decreed to assign over; and the Master of the Rolls held clearly, that the limitation over of the personal estate was good; and that the power given to the trustees, of distributing the testator's estate, was at an end, and could not be assigned over; and that therefore the power of distributing the same devolved on the Court. In *Widmore v. Woodroffe* (ante, vol. i. p. 13, n.), there was a gift of one third part to "some public charity;" this was held to be sufficiently certain, and the legacy good; but

(3) See this case stated from the original papers inspected by Lord Eldon C. on the rehearing, 7 Ves. 43, 71, &c., and repeatedly commented upon by his Lordship, *ibid.* *passim*. 1 Meriv. 60, 80, 83, 95, &c. The profession is also referred to the same reports, and especially to 7 Ves. 36, et seq. for accurate statements, and most important comments, by Lord Eldon, upon most of the cases adduced above on either side.

(4) See per Lord Eldon C. 7 Ves. 69, 70 (*sub nomine* Attorney-General v. Matthews), where his Lordship observes it is more fully stated in 2 Levinz. 3, 167. See also 7 Ves. 61, note (b).

(5) Stated from R. L. 7 Ves. 38, note.

the executors were to dispose of it under the eye of the Court, and therefore were to propose a charity to the Master. Here the testatrix has pointed out poor clergymen, having large families, and good characters, as the *objects of her bounty, which is a very sufficient [*521] object; and it is fully established, that where the object is sufficiently pointed out, though the person who is to administer the charity is removed the charity must be appointed by the Crown.

Mr. *Solicitor-General*, Mr. *Mansfield*, Mr. *Mitford*, Mr. *Preston*, and Mr. *Wilson*, for the next of kin, and persons in the same interest.

The circumstances of this case vary from any of those in the books. It is a gift of real and personal estate to Moggridge and Vaston, subject to certain trusts, appointing them executors, and desiring certain persons to assist those executors. The gift of the residue of the personal estate, is not to the same persons, but to Vaston, his executors and administrators, desiring him to dispose of the same in such charities as he should think fit; recommending poor clergymen, who have large families, and good characters.

Where the charity intended by a testator is clearly defined, it is true the death of a trustee will not prevent the *cestui que trust* from taking. Here, Vaston died in 1781, the testatrix died in 1790. Upon her death, two questions arose; 1st. Whether she had given this residue to any charity; 2d. Whether codicils have given double legacies. With respect to the first, none of the cases are like the present. The distinction in this case is the same as was in view in *White v. White* (ante, vol. i. p. 12), that the person intrusted with the execution of the legacy not having lived to perfect it, the legacy falls to the ground. In that case, it was a gift to such lying-in hospital as his executor should appoint, and an executor was named; afterwards the testator struck out the name of the executor, and did not appoint any other: it was argued that this was not a gift to any lying-in hospital; but there being, in that case, a specific kind of charity pointed out, the Court sustained it. Here the gift is general, to such charities as he shall think fit; and though he would have been obliged to give it to some charity, he had it fully in his power to give it to what charity he pleased; and, being dead, it is wholly uncertain to what charity he would have given it. In *Wheeler v. Shere*, Moseley, 288, 301, there the executors were to employ the residue to such charitable uses *as, by codicil, the testator should appoint: the testator made [*522] several codicils, but never appointed any charities; and Lord Chancellor said, that, "where a man devises to such charitable uses as he had appointed, that supposes he had made an appointment, though it could not be found: but here it was plain, the testator had made no appointment; by the codicil he confirmed his will, and made the trust of the surplus more extensive; it was to be in trust for a charity, if he directed any;" and the Court would not make an appointment of the charity. It is difficult to distinguish that case from this. Here the testatrix did not give the legacy to any particular charitable purposes, but left it to the executor personally to make the appointment. Then she must have it in contemplation that he must either survive her, or die in her lifetime; and although he dies in her lifetime, and she had notice of it, she still leaves the power of appointment personally in him, who she knew could not execute it; therefore it does not appear, that she died with the intention that it should be so distributed. The gift of the power lapses by his death, as much as an estate given to him would have done; because it has become

impossible he should appoint, and she did not mean the confidence to go to his representatives.

The case of the *Attorney-General v. Syderfen*, also admits of a distinction. That was the case of a charge. We admit it to be a strong case, but in the original gift nothing was left incomplete; it does not appear what had become of the writing, but there is not the least evidence that the testator had destroyed it; as his destroying it would have been a revocation. All the Court said, was, that where the testator has given to charitable uses, the gift shall be supported; but they did not say this shall be the case where there is no gift. The *Attorney-General v. Hickman*, 2 Eq. Cas. Abr. 193, is also distinguishable from the present case; that was a gift to B. for the use of non-conforming ministers, with the advice of C. and D. It was contended, that it was a personal trust, and had failed by their deaths; but Lord Chancellor said, the charity was still subsisting. But in that case, the objects were defined by the testator. In *Doyley v. The Attorney-General*, the Court held the new trustee to be within the directions of the will. But it is very different where the trustee survives the testator, from the case where he dies in the testator's lifetime, and with his full [*523] knowledge of the *fact. In the present case there is no designation of any charity, to which the executor would be bound to apply this fund, as there has been in all the other cases. It is to Vaston, to such charities as he should think fit; so that the first question is, whether there is any trust at all; for although a recommendation will raise a trust, it will only do so where the subject to be applied is certain, and the object to which it is to be applied is certain also. Though the legacy is given to him, his executors and administrators, that only shows their interest, it will not carry the power to the executors and administrators; there is nobody but he himself can execute the trust. It would be impossible he should have exercised it if he had survived her, but had died immediately after, and she meant to take the chance whether he would survive her or not. With respect to the objects pointed out, they are poor clergymen; it is by no means so clear as non-conformist ministers; and although she recommends poor clergymen, he might have applied it otherwise, without being guilty of a breach of his trust; the words are not imperative, or sufficiently certain to create a trust within the requisitions of the case of *Harding v. Glyn*, 1 Atk. 469, and the other cases on the subject; not being given to particular persons, but to such persons as he should appoint, who can now make no appointment, and could make no appointment many years before the testatrix's death. In *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61, there was no gift but through the medium of Lady Sunderland; so here there was no gift but through the medium of Vaston. In the case of *Widmore v. Woodroffe*, the gift was to some public charity; it was said, that was a gift to all public charities, and the election only in the executors. In the *Attorney-General v. Glegg*, Amb. 584, two of the executors, to whom the choice of objects was given, were dead; and though the gift was supported in that case, it should seem, that if the third had been dead also, that the trust would have been at an end; yet the direction in that case was not so large as in the present. In *Hibbard v. Lambe*, Amb. 309, where new trustees were appointed to sustain the charities, it was laid down by Lord Hardwicke, that only the surviving executor could appoint the objects; so that, had he been dead, the whole must have failed. In *Brown v. Yeall*, the residue was to be applied to the purchas-

ing of such books, as, "disposed of under the following direction, might have a tendency to promote the interests of virtue and religion, and *the happiness of mankind; and then directed this charitable [*524] design to be executed under the direction of such persons, and under such rules, as by any decrees of the Court of Chancery, should be directed:" your Lordship held this gift to be void, for uncertainty. The gift here being to Vaston himself, who is dead, and to be distributed in uncertain charities, must, upon the whole, be void.

Then, with respect to the several codicils, whether they are duplications of the legacies, or mere repetitions. The two, upon which the difficulty arises, are those of the 12th of April, and the 10th of May, 1780; that of the 10th of May, seems to be a mere substitution of that of the 12th of April: that of the 12th of April is the original codicil, it is in her own handwriting: the corrections and interlineations are in the handwriting of Mr. Woodford, in whose hand the second codicil also is. What is laid down in the cases on the subject of duplicated legacies, only applies where there is no evidence of the testator's intention; the rule laid down by Mr. Justice Aston, in *Hooley v. Hatton* (cited in the note to *Ridges v. Morrison*, ante, vol. i. p. 389), is, that where there is a gift of two legacies, without any evidence of the testator's intention; the presumption is, that they were intended to be doubled. But here, the will and codicils afford evidence to the contrary. The will gives Ellen Pheasant 15*l.* a year; she is not mentioned in the first codicil: the second codicil gives her 5*l.* a year more than I have given her by the will. She had by will given George Elliot 200*l.*; by the first codicil she gives him 100*l.* more than she had given him by the will: by the second codicil she repeats the gift, 100*l.* more than she had given him by the will; she could not mean more than she had given him by the will and codicil. The same with the gifts to the Thackwells. They seem little more than repetitions. In short, except the 500*l.* given by the former codicil to Mr. Woodford, which is not in the second, the second is nearly a copy of the first. The omission might be a delicacy in Mr. Woodford, who might not choose to insert that legacy in a codicil drawn by himself, but to leave it in her handwriting. It seems as if he had begun altering the former codicil, but had found the paper would not admit of it; and had therefore drawn the second codicil.

The matter of the codicils affords evidence that she did not mean to duplicate the legacies. Where one codicil is so mere *a [*525] repetition of the former, it has been held not to be a duplication of the legacies; as in the case of the Duke of St. *Albans v. Miss Beauclerk*, 2 Atk. 636, where the fourth codicil was held to be a mere substitution for the first; and lately, in *Coote v. Boyd* (ante, vol. ii. p. 521), where your Lordship held, that one legacy having been inserted, did not show that the remainder of the second codicil was not intended as a repetition of the first. That case is so similar to the present, that it is hardly to be distinguished from it. Under the authority of the cases, therefore, these are not accumulative legacies.

Mr. *Schoyn*, and Mr. *Sutton*, for the defendant Pollock, who claimed 100*l.* under each of the codicils.

It is admitted in this case, that there is a very large residuary fund.

But it is suggested, that the second codicil is a substitution for the first. The first codicil is in the testatrix's own hand; and it seems to be as good, in point of form, as that drawn by Mr. Woodford. He has made several alterations in the first draught, but he certainly did not mean the second as a substitution; for, by that, he would have deprived himself of the

legacy, and if he had so intended, he would have instructed the testatrix to have destroyed the former; instead of which, they were all found tied up together with the will, which shows her intention that they should all have their effect.

The general rule is quite clear in the Roman, the canon, and the common law, that if the legacy be repeated in the same instrument, it is not doubled; if in different instruments, it is a duplication of the legacy, unless the same reason is given for the second legacy. The rule is so laid down by Godolphin, in his *Orphan's Legacy*, p. 3, c. 26, s. 46, Swinburne, 526. In the present case, no reason is given for the legacies. In *Wallop v. Hewit*, 2 Ch. Rep. 37, and in *Foy v. Foy*, 1st of February 1785 (ante, vol. i. p. 390, n.), it was held, that the repetition of the legacies, in the codicils, were duplicative of the legacies. The case of *Coote v. Boyd*, went upon the singular circumstances of the case, which your Lordship thought sufficient to show, that it was not the intention of the testator to double the legacies; and that the codicil was only made for the purpose of introducing Miss Monckton's *legacy, and your Lordship particularly relied on the repetition of the residue. The case of the Duke of *St. Albans v. Beauclerk*, is very different from the present. There specific things were given twice, which showed the last codicil to be meant only as a repetition of the former. Lord Hardwicke went upon that ground, and upon the residuary legacy being repeated. The circumstance principally relied upon, on the other side, is, the repetition of the legacy to Elliot in both codicils, in nearly the same terms; but it does not follow that, if it is a repetition with respect to Elliot's legacy, that it is so as to the whole.

Mr. *Burton*, for Brooks, and Elizabeth his wife (late Elizabeth Thackwell), others of the Thackwells, and George Elliot.

That the presumption is in favor of double legacies, where they are in different instruments, and without a particular cause, appears by the citations from Swinburne and Godolphin, and the other cases cited. Admitting that, where the codicils are particularly alike, they may be deemed repetitions, it is not improbable here, that with the large property of the testatrix, and that the Thackwell family were her next of kin, she might mean to give 1200*l.* to the eldest two daughters, and 4900*l.* to the others. The legacies are given differently; under the first codicil, if the eldest died under 21, the legacy would lapse; under the second, it would survive. With respect to Elliot, he has 200*l.* under the will; by the first codicil, he has 100*l.* given him over and above what was given by the will; in the second codicil, he has also 100*l.* given him, over and above what was given him in the will. In the will, a particular attention is paid to him; and also in the third codicil, where she wishes him to stay upon the estate, at a salary of 50*l.* a year, which she thought would be of great use to the executors. Besides these, there are considerable variations made by the codicils. In the first codicil, Mr. Woodford has a legacy of 500*l.*; in the second this is omitted; yet, if he had survived the executrix, he must certainly have taken the 500*l.* So, Ellen Pheasant, who, by the will, was to have 15*l.* a year, by the second codicil took an additional 5*l.* a year, which is a mark of increased affection. The first, third, and fourth codicils, are all of the testatrix's own handwriting. If Mr. Woodford was entitled to his legacy, it does away the objection of the second codicil's being a mere repetition of the first.

[*527] *Lord CHANCELLOR expressed himself to the following effect: (6)

(6) See the judgment much more fully reported, 1 Ves. jun. 472. And upon the question

The question is, whether these legacies, given by the second codicil, are additional legacies; or merely a repetition of those before given by the former codicil.

The general rule is, that where legacies are given by two distinct instruments, they shall be looked upon as additional legacies, unless there appears, upon the face of the instrument, an intention of the testator to the contrary. I am sorry to say, that the determinations have gone upon very indistinct principles. 1st. It has been said, that the legacies are additional, because there was no reason for making a second instrument, unless there was an intention of adding to the legacies: but this rule is subject to be checked, where it appears that the second are mere repetitions of the first, and then they shall not be construed as additional. Where circumstances afford presumption that they were mere repetitions, it is a stronger probability that they were intended as the same legacies. It is proper, therefore, to consider the legacies, which in the present case are repeated, as well as those which are added. The codicils, in this case, are clearly different; because there is a legacy in the first to Mr. Woodford, which is not adeemed or repeated by the second; which shows, that the second codicil was not intended as entirely a substitution for the first. If it was a repetition, it was so because it purported to repeat the legacies, and explain them. His Lordship read the legacies as given in the two instruments; and observed, upon that to the Thackwells, that in the first codicil it was so loose, 600*l.* stock only being mentioned, that it would be uncertain, unless you could gather, from some other part of the will, what stock was intended; and that this was explained by the second codicil, where it was pointed out to be three per cent. consols: he also observed, that though these legacies were the same in effect, yet there was a difference as to accumulation; and the phrase in the former codicil was corrected. Of the legacies to Triquet and Pollock, he observed, they were almost exactly repeated; and with respect to Elliot, that the testatrix had added, "provided he be then in my service," and went on. It has been contended, that, by the reference being to her will, she meant the legacies only to be added to what she had given by her will, not by the codicil also. I think that if * she had given different legacies, or had assigned different[*52S] reasons for them, they would have been additional legacies, both to those given by the will and the codicil also; but that having given the second legacies in such a way only as explains what she meant in the first codicil, it shows that she meant them only to be additional to what she had given to the same persons by the will. It seems, by the same hand, that made the interlineations in the first codicil (Mr. Woodford's), writing the second codicil, that he had attempted to alter the first, but found from the paper that he could not do it, and therefore wrote the second; the omission of the legacy to himself might be from delicacy, and that he wished that to remain in her own handwriting. I think, therefore, upon the reasoning of all the cases, in which it is argued upon the ground that there is no reason for the second instrument but for the purpose of adding the legacies, that in this case, there being a good reason (that of explaining the first), I cannot consider these legacies as being additional ones to those given before. (a)

relative to the charity, see particularly the judgment of Lord Eldon C. upon the rehearing, 7 Ves. p. 67, 89.

(a) See *Ridges v. Morrison*, 1 Bro. C. C. 399, and notes and cases cited; 2 *Williams*, Ex. Pt. 3, B. 3, ch. 2, § 7, p. 801, 802; *Wray v. Field*, 6 Madd. 300; S. C. 2 Russ. 257; *Mackenzie v. Mackenzie*, 2 Russ. 262; *Simon v. Barber*, Tambl. 14; *Gillespie v. Alexander*,

As to the second question. If the cases upon the subject were not so clear, I think it would bear some reasoning: it is a gift of the "residue to Vaston, desiring him to dispose of it in such charity as he should think fit, recommending poor clergymen, who have large families and good characters." There has been some argument upon the effect of these words, and whether they are precatory or jussory, but it is perfectly clear, that Vaston could not claim this property for his own use. All the rules, both of the civil or common law, would repel him from taking the property in that way. He could take it only for the purpose of charity. Then, he must be a trustee; it is the same as if she had given it to a certain charity, naming him as a trustee; then, the circumstance of his being dead in the lifetime of the testatrix, or the length of time that he had so been dead, cannot govern the effect of the will; if it could, there might be a total end to dispositions by will. (7) This reduces it to the common case of the death of a trustee which cannot defeat the effect of a legacy. (8) Then can I say, that this legacy is not sufficiently distinct to bind the property? The most general gift to charitable purposes has been decreed to be carried into execution, and the trustee's not being alive to administer the charity, cannot defeat the intention. (7) Here she [*529] has pointed out clergymen as the objects *of bounty, which is sufficiently distinct; but it must be referred to the Master, to whom a scheme must be proposed for the execution of the charity. (9) (b)

(7) See also per Lord Eldon C. on the rehearing, 7 Ves. 82, &c., and in *Mills v. Farmer*, 1 Merivale, 94, 95, 99, 100.

(8) But see per Lord Eldon C. in 1 Meriv. 82, 99, 100, &c.

(9) "And let all parties have their costs out of the estate, and as between attorney and client; since it is a cause between relations." (†) From Mr. Vesey, junior's, report.

(†) This direction, and the rehearing before Lord Eldon, originating in an intimation from the Court, led his Lordship, as of course, to give the costs of the rehearing in the same manner. Vide 7 Ves. 63.

2 Sim. & Stu. 145; *Frazer v. Byng*, 1 Russ. & My. 90; *Hemming v. Gurrey*, 1 Dow & Clark, 35; S. C. 1 Bligh, N. S. 479; *Moggridge v. Thackwell*, 1 Ves. jun. 464, and note to that case, in 1 Hovenden, Supp. 186, 187, 188, and cases cited.

(b) See *Going v. Emery*, 16 Pick. 107; *Attorney-General v. City of London*, 3 Bro. C. C. 171, and notes; *White v. White*, 1 Bro. C. C. 15, note (a), and numerous cases there cited, both from the English and American Reports; 2 Story, Eq. Jur. ch. 32, § 1166-1170; *Bartlett v. King*, 12 Mass. 537; *Moggridge v. Thackwell*, 1 Ves. jun. 464, and note to that case, in 1 Hovenden, Supp. 188-191, and cases cited; 2 Kent (5th ed.), 508, 509, and note.

[The decree, as it was finally pronounced, upon a motion to vary the minutes, declared that the residue of the testatrix's personal estate passed by the will, and ought to go and be applied in charity, regard being had to poor clergymen with good characters and large families, according to the recommendation in the will; and that the Master should approve of a scheme to effectuate the purpose of the said charity, with liberty for the parties to lay proposals before him, and costs were given as between attorney and client.

The residue amounted to 50,000*l.*, and a scheme (the particulars of which are given 7 Ves. 89) was submitted by the plaintiff, and approved by the Master. Upon the cause coming on for further directions upon the report, Lord Rosslyn intimated, that the decree, so far as it respected the charitable disposition, should be reheard; in consequence of which intimation, the cause was reheard before Lord Eldon, when, after a full and anxious discussion, both at the bar, and from the bench, of all the cases upon the subject, his Lordship (as he has since observed, 1 Meriv. 99, entirely by the force of precedents, and much against his inclinations) affirmed the decree, 7 Ves. 36, and that determination was afterwards affirmed by the House of Lords, 13 Ves. 416. The subject has been again very elaborately discussed in the late case of *Mills v. Farmer*, 1 Meriv. 55.

The doctrine established by all the determinations, as collected in those two cases, is, that a disposition in favor of a charity, is not to be construed according to the rules which are applicable to bequests to individuals; a distinction proceeding partly on principles in the Roman law, not at present perfectly comprehended, and partly on the religious notions which formerly obtained in this country, according to which it fell to the ordinary's province to distribute in case of intestacy. And therefore where the testator has evinced a general intention in favor of charity, but has left the mode in which it is to be carried into effect uncertain, that intention will be carried into execution.

In the present case it was ably contended on the appeal on the part of the Attorney-Gen-

eral, that the bequest was of that general nature, that the disposition fell to the crown, and was not to be executed by the Court; upon which Lord Eldon adopted the distinction, which has since been adhered to, *Paice v. The Archbishop of Canterbury*, 14 Ves. 364, that where the charitable bequest is through the medium of trustees, whether all the trustees are dead, or some being dead, the discretion is either wholly or partly gone; or surviving trustees refuse to act; or some are willing to act, and the others refuse; in all those cases, the Court distributes the fund by means of a scheme; but where the object is charity without a trust interposed, the constitution, in the language of Lord Chief Justice Wilmut, finds a trustee in the king, as *parens patriæ*, who executes it by sign manual, exercising a discretion with reference to the intention of the testator.

There have been some cases, one of them well known by the name of the case of Wheatley Church, in which the *cy pres* doctrine had been said to have been carried to an improper length, and therefore it was holden, that where the gift was for a particular charity, which, from circumstances, could not be applied, it should not be applied to another lawful use, the general intention in favor of charity not being there to be inferred, vide *The Attorney-General v. Goulding*, ante, vol. ii. 428. — *Eden.*]

BAYLEY v. The Corporation of LEOMINSTER.

[S. C. 1 Ves. jun. 476.]

(Reg. Lib. 1791. A. fol. 297. b.)

Under a covenant in a corporation-lease to renew, upon the falling in of one life forever: there is no equity to extend it to the case where two are suffered to fall in, although a compensation is offered. (1)

By indenture, of the 25th of August, 1739, between the bailiffs and capital burgesses of the borough of Leominster, of the one part, and Penelope Bangham, of the other part: the bailiffs and burgesses, in consideration of the surrender of a former lease of the same premises for three lives, and also in consideration of 4*l.* paid by the said Penelope, demised certain premises therein mentioned unto the said Penelope, her executors, administrators, and assigns, from the day of the date thereof, for the term of 99 years, if the said Penelope Bangham, and Mercy Bangham her daughter, and George Karver, or either of them, should so long live, at the rent of 12*s.* a year; and the bailiff and burgesses covenanted, "that they and their successors, when and as often as either of the said three lives should die, and there should be only two lives remaining in the premises, if the said Penelope Bangham, her executors, administrators, or assigns, should within the space of six months next ensuing the decease of such life, or at the first or second chamber, which should be held after the expiration of the said six months, apply for a new lease of the said premises, and pay the sum of 4*l.* to the bailiff, &c. with six months' interest for the said 4*l.* after the rate of 5*l.* per cent., the said bailiff, &c. should add a third life in the said premises, and grant to her or them a new lease of the said premises, to commence from the time of such payment, if the two other lives, and such third life as should be nominated by the said Penelope Bangham, her executors, &c. or either of them should so long, under the like rents, covenants, and agreements, and to the several uses and trusts thereinbefore declared, and so from time to time forever after, as often as the case should so happen." In 1745, this lease was made the subject of a settlement on the marriage of Adam Ward, with Mercy, the daughter of Penelope Bangham, and was thereby conveyed to uses which have long since determined. There were

(1) See the doctrine stated, with the authorities, in *Somerville v. Chapman*, ante, 1 vol. 61, and *Tritton v. Foote*, 2 vol. 636, 637, &c., with the Editor's notes, *passim*; more especially the references to 9 Ves. 325; 14 Ves. 41, 58; 16 Ves. 72, 84, &c.

[*530] several renewals, in consequence *of the death of persons on whose lives the said lease, and the renewed leases, were made. Some time before 1764, Penelope died intestate, and administration of her personal estate was granted to her daughter, Mercy Ward. In 1763, there was a new lease, on the decease of one of the lives; and the lives for which the lease was then granted, were Adam Ward, Mercy, his wife, and the plaintiffs; and in 1764, Adam Ward, and Mercy his wife, assigned the beneficial interest in the lease to the plaintiff, in consideration of the sum of 312*l.* and their trustees conveyed to him. The plaintiff entered under the assignment, and has considerably improved the premises. Adam Ward died in 1781, but no new life was added in his room, or new lease executed by the corporation, no application being made by the plaintiff for that purpose; Mercy Ward died in 1789, or the beginning of 1790, and after her death (there being then only his own life remaining in the lease) the plaintiff applied to the corporation for a new lease for 99 years, determinable on the death of the survivor, of the plaintiff, and two other persons to be appointed by him, offering to pay to the defendants 4*l.* with interest from the death of Adam Ward, and also 4*l.* as a fine for renewal, on the death of Mercy Ward, and a further sum of 4*l.* upon a supposition that, if plaintiff had renewed said lease on the death of said Adam Ward, by putting in another life, such other life might have fallen in between the death of Adam Ward, and of said Mercy Ward. This the corporation refused, insisting they were not bound, by the covenant, to renew upon the falling in of two lives; but offered to grant to the plaintiff a new lease for 99 years, or three lives, upon his paying a fine of 100*l.* for such new lease, and a fine of 34*l.* 10*s.* upon the death of one life; which terms the plaintiff not choosing to comply with, he filed the present bill, praying that the defendants might be decreed to grant him a new lease of the premises for 99 years, or three lives, upon the terms of his offer.

The defendants, by their answer, admitted the facts, and the tender of 16*l.* 16*s.* as a fine for renewal, and insisted that no application being made till after the falling in of the second life, though the plaintiff must have known of several corporation meetings, they were not bound to renew, but upon their own terms.

Mr. *Solicitor-General*, and Mr. *Ainge*, for the plaintiff, contended, that, although the covenant was only to renew upon the falling [*531] *in of one life, that the spirit of the covenant extended to the case of two lives falling in; that the case lay in compensation, and that no forfeiture is to be incurred when compensation can be made.

LORD CHANCELLOR said, the cases upon Irish leases in the House of Lords went the whole length of this case; that the plaintiff was not bound to renew upon the falling in of one life; he had his election, whether to renew or not, and has made that election; the corporation therefore are not bound, now, to renew. It has been determined over and over in the Irish cases. (a)

Dismissed the bill. (2)

(2) With costs. — R. L. But the cause being heard only on bill and answer, Mr. Vesey states, that the Court afterwards reduced the costs to 40*s.* under the discretion vested in it by Lord Hardwicke's order, 2 Atk. 283, and Mr. Beames's Ord. Ch. 460. < See Cowdell v. Tatlock, 3 Ves. & Bea. 19. >

(a) See Maxwell v. Ward, 1 McClelland, 465; 1 Madd. Ch. Pr. (4th Am. edit.) 35, 36; Rawstorne v. Bentley, 4 Bro. C. C. 415, and note to that case, Naugle v. Smith, 1 Irish Eq. 119; Eden on Injunct. (2d Am. edit.) 42, 43, and note (c), and cases there cited.

LEGARD v. HODGES.

[S. C. 1 Ves. jun. 477, and affirmed on rehearing, *postea*, 4 vol. 421.]

(Reg. Lib. 1791. B. fol. 381.)

A covenant to appropriate one third of the produce of a real estate, to raise a sum of money, is not a mere personal covenant suable at law, but creates a lien upon the land, and the covenantees are entitled to have it specifically performed. (1)

By indenture, bearing date 13th of June, 1782, previous to the marriage of the defendants, Anthony Hodges and Anna Sophia, his wife (late Anna Sophia Aston), and made between Henry Aston, Esq. deceased, only son and heir-at-law and devisee named in the will of the honorable Catharine Aston, deceased, of the first part; the defendant Anna Sophia (by her then name of Anna Sophia Aston), youngest daughter of the said Henry Aston, of the second part; the defendant, Anthony Hodges, Esq. of the third part; and the plaintiffs, of the fourth part; reciting the intended marriage, and that Henry Aston had agreed to execute the power vested in him by the will of said Catharine Aston, and to charge certain manors with the sum of 4000*l.* as the portion of the said Anna Sophia Aston; it was agreed the said sum should be paid into the hands of the plaintiffs, and that the said Anthony Hodges should pay into the hands of plaintiffs the sum of 10,000*l.* making together 14,000*l.* as a fund for the jointure of the said Anna Sophia, and for portions for younger children of the marriage: the said Henry Aston charged his manors with the said sum of 4000*l.*, and said Anthony Hodges covenanted, that, in case the marriage took effect, "he would, after three years from the solemnization of the marriage, set apart and appropriate as a fund towards raising said 10,000*l.* one third part of the clear yearly rents arising from his several estates in Berks and Oxford, *and the sev- [*532] eral islands of St. Christopher's and Montserrat, and would yearly pay the same to the plaintiffs, or the survivor of them, his heirs or executors, until the said 10,000*l.* should be paid, and in case of his death, leaving the said Anna Sophia, or any daughter or younger children of the marriage, then the heir, &c. of said Anthony Hodges should, within two years after his death, pay to plaintiffs, or the survivor, the said 10,000*l.* or so much as should remain unpaid, with interest at 5*l.* per cent. from the death of the said Anthony Hodges, upon the trusts of the settlement. And it was agreed, that the plaintiffs should stand possessed of the said 4000*l.* and 10,000*l.* in trust, to pay the dividends thereof to the said Anthony Hodges for life, and after his decease (among other things) to pay the said Anna Sophia, during her life, 500*l.* a year, as her jointure, in bar of dower, and subject thereto, in trust for daughters or younger sons of said marriage, and in default of issue, in trust for Anthony Hodges, his executors, &c.

The marriage was solemnized about 16th of June, 1782, but, at the time of the bill filed, there had been no issue.

By indenture, of 7th April, 1784, made between the defendant Anthony Hodges of the first part; and the defendants Johnson and Turner of the other part; reciting the deed of settlement, and that defendant Hodges, being considerably indebted, was desirous to go abroad, and had requested

(1) This case was affirmed on a rehearing by Lord Loughborough C. *postea*, 4 vol. 421. Upon the point, see also *Power v. Bailey*, 1 Ball. & Beatt. 49, 52.

the trustees to take the management of his estates; said Anthony Hodges demised to Johnson and Turner all his estates in Great Britain and the West Indies, to hold the same for twenty-one years, in case the said Anthony Hodges should so long live (subject to the mortgages thereon), in trust, to receive the rents, &c. of said estates, and to pay and apply the same for the year 1783, unto the said Anthony Hodges, or as he should appoint, afterwards in paying their own costs, and in the next place, to pay said Anthony Hodges 1000*l.* a year, and the residue in the payment of the debts of the said Anthony Hodges.

Johnson and Turner entered into possession, under this deed.

Afterwards, differences arising between Mr. and Mrs. Hodges, they agreed to live separate; and, thereupon, by articles of separation, [*533] *dated 8th of August, 1785, and made between Anthony Hodges of the first part; Anna Sophia Hodges of the second part; the plaintiffs of the third part; Johnson and Turner of the fourth part; and the plaintiff Henry Hervey Aston, brother of the said Anna Sophia Hodges, of the fifth part; reciting the settlement of 16th of June, 1782, and the said indenture of 7th of April, 1784. It was witnessed and agreed between the said Anthony Hodges, and Anna Sophia his wife, that they should live separate, and that said Anthony Hodges should, yearly, for the space of three years next ensuing, in case they should both so long live, pay to the plaintiff, Henry Hervey Aston, his executors, &c. the yearly sum of 500*l.*, and after the said three years, the yearly sum of 600*l.* in trust, for the sole use of the said Anna Sophia Hodges, for her maintenance; and for securing the same, the said Anthony Hodges assigned to the said Henry Hervey Aston, his executors, &c. all the dividends and interest of the said sum of 4000*l.*, and such part of the said 1000*l.* per annum, allowed to the said Anthony Hodges by the said indenture of 7th of April, 1784, as would be sufficient, with the dividends of the said 4000*l.*, to answer the respective sums of 500*l.* and 600*l.* as they should become due.

Hodges and his wife have ever since lived separate.

Plaintiff, Henry Hervey Aston, only son and heir of Henry Aston, the settlor, paid the sum of 4000*l.* to the trustees, who laid the same out in the purchase of 5451*l.* 8*s.* 10*d.* 3 per cent. consol. annuities, and the plaintiffs, by deed-poll on the back of the settlement, declared the trusts thereof.

No part of the 10,000*l.* covenanted in the said settlement, to be paid by Hodges to the plaintiffs, Sir John Legard and Henry Hervey Aston, the trustees in that settlement being paid, they filed the present bill against Hodges and his wife, and Johnson and Turner, the trustees in the indenture of 7th of April, 1784, charging that the produce of the estates ought to be accounted for to them, and one third part thereof applied for the purpose of raising the said 10,000*l.*, and praying an account of rents and profits received from the estates, and of receipts and payments made by defendants Hodges, Johnson, and Turner, and that a full third part since the 15th of June, 1785, may be paid to the plaintiffs on the [*534] *trusts of the settlement, and a third part of the future rents, profits, &c. may be paid to them for the same purposes, until the 10,000*l.* shall be paid according to the covenant of the defendant Hodges; and that the said covenant may be specifically performed, and that a receiver may be appointed of the real estates in England, and a consignee of the produce of the plantations in the West Indies.

To this bill the defendants put in answers, by which they admitted the

facts stated in the bill, and notice of the settlement; but the defendant Johnson said, that the plaintiffs had notice of the trust deed, and farther said, that the 1000*l.* a year had been paid to the defendant Anthony Hodges; and he and Turner stated, that Johnson had paid several mortgages and other debts, and was entitled to stand in the place of the mortgagees, and is a creditor of the defendant Anthony Hodges in 2750*l.* Johnson further insisted, that he was not bound to appropriate the third part of the produce of the estates to the payment of the 10,000*l.* till the plaintiffs made application to him, which they had not done, and that they having induced him to pay the debts, he is not liable to account for the same, and denied having in his custody any money arising from the plantations, and says he is in advance on account of the fund.

The defendant, Anna Sophia Hodges, disclaimed any interest in the 10,000*l.* further than she was entitled under the settlement and articles of separation.

It was argued the 30th of April, and 8th of May.

Mr. Mansfield, Mr. Hardinge, and Mr. Alexander, for the defendants, argued that the trustees in the indenture of 7th of April, 1784, are not liable to account for anything, no demand having been made by the plaintiffs, as trustees in the settlement, till the filing of the bill; that the plaintiffs are not entitled to a specific performance. The covenant is merely a personal covenant by Hodges, to appropriate the third part of the produce to the payment of the 10,000*l.* An action would lie for the breach of it, and in such action damages to the amount of the third part might be recovered: but the estate itself is not bound by the covenant; there is no lien upon the estate itself. There is no *case [*535] precisely like this; but that of *Collins v. Plummer*, 1 Wms. 164, applies to the principle of this: there the tenant in tail covenanted not to suffer a recovery; he did suffer one, and the covenant was held to bind the personal assets, but not to affect the land. The parties in this settlement knew the covenantor might break his covenant. It is a covenant to set aside so much of the produce, but it is Hodges who is to appropriate, and before he can do so the produce must come into his possession; it cannot be stopped before it comes to his hands; he must receive the rents, he must divide the funds. In cases where persons covenanting to pay have been decreed to stand seised to the use of the covenantee, the management has not been reserved, as in this case, to the covenantors; most, the trustees under the deed cannot be liable till they had notice from the plaintiffs, who stood by and saw Mr. Johnson paying the debts, without calling upon him to appropriate the third part of the property to the uses of the settlement.

Mr. Solicitor-General, and Mr. Stanley, for the plaintiffs.

If the covenant does not give a lien upon the land itself, it is only a personal covenant, and the trustees in the settlement can only bring an action at law, and can here only have a bill of discovery in aid of that action: in this case they must bring an annual bill for an account, in order to bring an annual action for the sum discovered; but we insist they are entitled to a specific execution of this trust. The principle of the case of *Collins v. Plummer* would put an end to all cases of lien; but the Court has said, over and over, that covenants like these constitute specific liens, and that parties are not bound to bring actions on the covenant. Notwithstanding what is said in Lord Warrington v. Langham, Pre. Ch. 89, the Court, in *Flight v. Cook*, 2 Ves. 619, corrected the doctrine before laid down; where there is a covenant not to pay money,

but to set aside a part of the produce, the party may claim a specific performance. It is within the case of a covenant to pay the profits; the trustees have a right to come into equity, for an account, to have the profits applied according to the covenant, *Bosvil v. Brander*, 1 Wms. 458. Assignments of choses in action are supported upon the ground that they amount to covenants to assign: here it is a covenant, that the assignor will not receive the money, or will hold it as a [*536] *trustee. The doctrine of lien has been of late years much extended: in *Sowden v. Sowden* (ante, vol. i. p. 582), where Sowden, by marriage settlement, covenanted to pay a sum of money to trustees, to be laid out in land, to be settled to uses, he did not pay the money, but purchased a freehold estate; the daughter, who would have been entitled to the estate purchased by the trustees, if any had been so purchased, was decreed to have a real lien on the estate purchased by the father. *Bosvil v. Brander* was decided on another point, but the wife was held to have a specific lien upon the note. The only difference between that case and this is, that here it is a third part of the produce, there it was a specific sum. So, whilst seamen's wages were assignable, if A., a seaman, indebted to B., assigned his wages, a bill by the assignee would be allowed. In this case it is in the form of a covenant, not of an assignment: but wherever the thing bound is certain, there may be a specific performance. Here the parties did not rely on the general covenant of Hodges, but took a special covenant to appropriate one third part; it is impossible, therefore, for him to put himself in such a situation as shall disable him from performing the contract. In *Durnford v. Lane* (ante, vol. i. p. 106), the principle of the determination was, that, although the wife might not be bound, yet the husband having entered into a covenant, it was against conscience for him, by making the mortgage, to put himself into a situation in which he could not perform his covenant; therefore he could not give a title to the mortgagees. Here Hodges has covenanted to set aside one third of the produce for a particular purpose, he therefore covenanted to keep himself in a situation to do so. A covenant to set aside a certain part for a particular purpose, does not give a remedy against the general property, but is a lien on the specific property.

Mr. Mansfield, in reply.

The doctrine maintained is, that anything amounting to an agreement to assign, will be equivalent to an actual assignment. The question is, whether Hodges has made himself a trustee as to these rents and profits; if so, at the end of the three years, the plaintiffs might file their bill and pray a receiver, or that Hodges might be declared to be a trustee for them. It is impossible to construe this covenant in that manner; [*537] the fair construction is, *that, after the end of three years, Hodges should pay the 10,000*l.* at a rate equal to the third part of the produce of the estate: on account of the fluctuating nature of the property, no specific annual sum could be ascertained, therefore this sum was taken that it should be the third part of the produce. Without violence to these words, the estate could not be taken out of the hands of Hodges; if it was, it became impossible for him to perform his contract. The only decree that can be made is a discovery of the *quantum*, in order that the plaintiffs may sue at law. With respect to the cases cited on the other side, *Sowden v. Sowden* is only, that the father, by laying out money in purchasing a freehold estate, intended to perform his covenant, as much as if he had expressly laid it out in performance. *Bosvil v. Brander* does

not apply to the present case. *Flight v. Cooke* is not intelligible; it only shows that the Court will secure a contingent interest. So in the case of seamen's wages, that is applicable to a conveyance of anything assignable. In all the cases there is an agreement to assign, which is equivalent to an assignment; but there is nothing in this case equivalent to an agreement to assign. *Durnford v. Lane* has no application to the present case. The only question was, whether the wife was bound by the covenant: your Lordship held, whether she was bound or not, the husband was bound.

The only remedy here is a personal remedy against Hodges. At all events, the account cannot go against the trustees further back than the time when the plaintiffs called upon them to appropriate.

On the 13th of May, Lord CHANCELLOR pronounced judgment to the following effect:—

This bill was filed by the trustees in the marriage settlement, praying an account, and that they may be declared entitled, as trustees, to a third part of the produce of the estate of the defendant Anthony Hodges.

In order to raise the sum of 10,000*l.*, to be added to 4000*l.*, the wife's portion, the defendant Hodges covenanted that he would appropriate one third of the produce of estates in this kingdom and in the West Indies. He afterwards conveyed his estates to other trustees, to raise 1000*l.* a year for himself, and, with the *residue of rents and profits, [*538] to pay debts: that settlement takes notice of the former deed, so that all parties had notice of it, and the only question is, as to the operation of the first deed.

It is argued on one side, that it is a mere personal covenant on the part of Hodges, upon which the plaintiffs might bring an action against him, but that it did not create any trust of the estate; and for this they cited a case from *Peere Williams*, (2) where the party covenanted not to suffer a recovery; the consequence of which would be, that the estate, of which he was tenant in tail, would descend to his issue: it was argued, that it was a mere personal covenant; and it was held, in that case, to be so. That case gave countenance to the argument, that, in this case, it was a mere personal covenant. It was impossible, in that case, to make the doctrine apply, that where parties come to an agreement relative to any subject, the subject itself is bound by the agreement; (2) but I take the doctrine to be true, that where parties come to an agreement as to the produce of land, that the land itself will be affected by the agreement. In that case, the effect of the agreement was to restore the estate tail; and the consequence would be, to leave the party the whole power which he had before. There, in form, it was a personal covenant, and it was held it could not be corrected by the intent; there were not *termini habiles* for that purpose.

But, except that case, there are none to derogate from the generality of the doctrine, that where a man makes an agreement relative to any subject it will bind the subject itself. (a)

(2) *Collins v. Plummer*, 1 P. W. 104. It seems that case turned on the distinction that an actual conveyance had been executed, the covenants of which were merely personal; and in that case the very distinction was taken between a deed executed and complete in itself, and an agreement, which being merely executory, would be construed according to the intention of the parties at the time, and may be moulded accordingly. Vide *Forr*, 20, and the cases in Mr. Cox's note to *West v. Erissey*, 2 P. W. 356; < *Falkner v. O'Brien*, 2 Ball. & Beat. 223; *Fremoult v. Dedire*, 1 P. Wms. 422; *Williams v. Lucas*, 2 Cox, 160. >

(a) 2 Story, Eq. Jur. ch. 33, § 1231; *Collyer v. Fallon*, 1 Turn. & Russ. 469, 475, 476; *Power v. Bailey*, 1 Ball. & Beat. 52.

In this case it is merely a trust estate as to one third.

In *Broughton v. Langley* (2 Salk. 679), it was held, that though the estate was to remain in the covenantor, there was a trust for the benefit of the covenantee.

The plaintiffs, therefore, must be declared trustees as to one third of this estate. (*b*)

As to covenants running with the land, see 1 Metcalf & Perkins's Dig. Tit. Covenant, § 4, Pl. 146, et seq.; Trustees of Watertown v. Cowen, 4 Paige, 510; Astor v. Miller, 2 Paige, 68; Taylor v. Owen, 2 Blackf. 301.

A covenant by a debtor to pay certain debts, owed by him out of a designated fund, when the same shall be received by him, cannot be construed into an equitable mortgage of the fund, so as to give the creditors a specific lien thereon; such covenant is merely personal. *Rogers v. Hosack*, 18 Wend. 319.

(*b*) This decree was affirmed by Lord Rosslyn upon a rehearing, post, vol. iv. 421, where see the Editor's note. Vide also *Hale v. Elliot*, cited Sugden on Powers, 355; 1 Ch. Ca. 28; 1 Vern. 206; *Finch v. Earl of Winchelsea*, 1 P. W. 232; *Freemoult v. Dedire*, ib. 429; *Coventry v. Coventry*, reported at the end of *Fearne's Maxims*; *Williams v. Lucas*, 1 P. W. 430, n.; 2 Cox, 160; *Shannon v. Bradstreet*, 1 Scho. & Lef. 63; *Blake v. Marrell*, 2 Ba. & Bea. 44; Affirmed 4 Dow, P. C. 248; Fonbl. Eq. B. 1, ch. 5, § 7, and notes; and see also notes to *Jackson v. Jackson*, 4 Bro. C. C. 467. — *Eden*.

[*539]

*PIGOTT v. BULLOCK.

[Vide S. C. 1 Ves. jun. 479.] Mr. J. Buller, for the Lord Chancellor.

(Reg. Lib. 1791. B. fol. 524. b.)

Testator devised his estate to his wife for life, "with liberty to cut timber and underwood for her own use, but not to sell;" she cut underwood and sold it and died: her estate is not accountable for the money produced to the next taker for life, impeachable for waste; [he having no property in the underwood till his estate comes into possession.]

JOHN PIGOTT, Esq. being seised of real estate at Doddershall, in the county of Bucks, by will, devised the same to Christobella his wife, for life, "with full liberty to cut timber and underwood, for repairs, or for her own use, in fuel or otherwise; but not to sell the same;" remainder to the plaintiff for life; remainder to his children in tail. The testator died in 1751; Christobella the widow, entered upon the estate, and took the profits of the same. She afterwards, in 1754, married Richard, the late Lord Viscount Say and Sele, who died in 1781. Between the death of the testator and her second marriage, during the second coverture, and after the death of Lord Say and Sele, she (with her husband Lord Say and Sele, during the coverture) cut large quantities of underwood, more than was necessary for repairs, or her own use, and sold the same to a considerable amount; she died in 1789, having made the defendants her executors. The plaintiff filed the present bill, for an account of underwood cut, between the death of the testator and the second marriage; and, from the death of Lord Say and Sele to that of his widow; admitting that his remedy, for that cut during the second coverture, was against the assets of Lord Say and Sele, in the hands of his executors.

Mr. Lloyd, and Mr. Alexander, for the plaintiff, said, it was understood, that it would be argued on the other side, that this restriction was void; but they did not see how that argument could be supported; as the giver of any benefit might prescribe conditions or restrictions to his gift. That it is true, where the restriction is inconsistent with the gift, as a gift in tail, with condition not to suffer the recovery, it is void; but here, the restriction is consistent with the gift, and is good. Then the first question

will be, who is entitled to the value of the timber and underwood which has been cut; whether the plaintiff, as the next tenant for life, or the next owner of the inheritance. If the latter, that is the plaintiff's son, and it must stand over to make him a plaintiff. The plaintiff, as being the next taker for life, would be entitled to the underwood if now standing, and would be entitled to cut it, and put the money into his *pocket; [*540] therefore, as the injury is done to him, he is entitled to the account. There was no intention on the part of the testator to make this underwood part of the inheritance. No restriction was laid upon the first taker for life; therefore he could do everything, which a tenant for life impeachable for waste, could do; and, of course, could cut and sell the underwood. It is true, that in *Whitfield v. Bewit*, 2 Wms. 240 (3 Wms. 267), it was held that timber fallen by wrong, or accident, belongs to the first owner of the inheritance; and that it has been held in *Garth v. Cotton*, 3 Atk. 751, that the tenant for life, and tenant in tail in remainder, cannot cut timber by collusion, before the tenant in tail comes into possession; and that, in such cases, the Court will take the money, and lay it out, till it sees who will ultimately be entitled to the inheritance; and that in the case of *Williams v. The Duke of Bolton* (Mr. Cox's note on 3 Wms. 268), the Court did the same thing, where the tenant for life, having the next inheritance in himself, cut timber; it will not do so, where the next tenant for life would himself have a right to cut the timber, and put the money in his pocket, as the plaintiff might do in this case. Here the underwood is wrongfully cut down, and Lady Say and Sele was answerable, to somebody, for the money. In *Garth v. Cotton*, the trustees would have had the right of action. Here the right to the money is in the plaintiff: suppose a bill had been brought by the heir, the money must have been brought into Court, and if he survived Lady Say and Sele, the money must have been paid to him. There is no case in the books exactly like this; the nearest is in 2d Croke, 688. Here, the injury being done to the plaintiff, he must have the remedy.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *Hollist*, for the defendants.

The bill seeks for an account of underwood cut down at two different periods. With respect to the former period, it is a sufficient answer, that it is for an account of underwood cut thirty-eight years ago; and though the statute of limitations is not pleaded, a court of equity will not give an account upon a stale demand. If she had possessed an estate by wrong, the remedy by ejectment would have been nearly doubly barred. With respect to the latter period, the question is, whether Lady Say and Sele was so restrained from cutting the underwood, that *if she [*541] did cut it down, the property in it would be in any other person; and if so, whether there is any pretence for asserting, that the property was in the present plaintiff, as the next person entitled to an estate for life.

The persons interested in contending against Lady Say and Sele's right, ought to be before the Court. But without contending on the want of parties:—This is not a reservation; if it was a reservation of the timber and underwood, the property of the timber and underwood would be in the person for whom reserved, or the owner of the inheritance. It is not a condition; if it was a condition, it would be void, as being repugnant to the gift; and a gift cannot be qualified by a condition repugnant to it. Co. Litt. There might as well be a condition not to cut grass for sale, as such a condition as the present: it would be to restrain a fruit of the ten-

ancy for life. Neither can it be a condition; because nobody can take advantage of a condition but the heir, and here the heir, on taking, would avoid all the limitations. Neither is it a condition for the want of a gift over; a condition, of which no one is to take the benefit, is of itself void. Here it could not be the property of the plaintiff; a tenant for life, impeachable for waste, has no property in the timber [unsevered]. Even a tenant for life unimpeachable, has no property in the timber. *Lewis Bowles's* case, shows that the clause "without impeachment of waste," gives him no property: it only gives him the privilege of cutting it; but if he does not cut it, it goes over with the estate. If the present plaintiff had a title, when did it accrue? At the time of cutting, he had none; she was at liberty to cut. No claim could arise till the sale. Where timber is cut by wrong, trover will lie for it; the first tenant of the inheritance may bring trover, though he cannot bring waste, where there is an intervening estate. But here was a gift to the wife for life, and therefore it was a gift to her of the profits of the estate for life, and the underwood is one of the profits; which, if not given to somebody else, is given to the tenant for life. I admit the case of the gift of a house, with the exception of a room; (1) but this is more like the gift of a house, with the exception of the right of sleeping in the second floor of it. It is a fruitless denotation of the testator's intention, and no claim of forfeiture or gift over.

This is not like the case of *Williams v. The Duke of Bolton*, (2) or [*542] any of those where the Court *will take the money. It is a mere ineffectual restraint: and the underwood being cut before the plaintiff's title commenced, he can have no right to recover. In all cases where there is no gift over, the restraint is fruitless; as in the case of a legacy with a condition that the party shall not marry, or shall not marry a particular person; without a gift over, the restraint is void. So of a lease declaring that the lessee shall not assign, it will have no effect, without a provision of forfeiture, though it is a case of contract.

Mr. *Lloyd*, in reply. With respect to the first period, if we are right, the cutting the underwood was a fraud in Lady Say and Sele, and consequently, the statute of limitations is out of the case; and although the action at law for the tort is gone by her death, a court of equity will give a remedy against her personal assets. 3 Atk. 757, *Garth v. Cotton*. (3) Then it is argued, that the present plaintiff is not the person entitled to the remedy, or that he has forfeited it by not coming sooner. With respect to the latter objection, it is not necessary that a person entitled to the benefit of a forfeiture should claim it immediately; it is sufficient for him to do so when he comes into possession. He did not come into possession till the death of Lady Say and Sele, in 1789; and in the year 1790 he filed the present bill. With respect to the restriction, I admit that a restriction repugnant to the gift is void; but in this case, there is nothing repugnant. There is no case to prove, that a testator may not give an estate, or any other thing, with a restriction of the use of it. In the case of the Chapter Coffee-house (*Sloman v. Walter*, ante, vol. i. p. 418), where the house was let with the reservation of a room; nobody doubted that the reservation was a good one. Here, the reservation is, that she shall not cut *for sale*; had it been, that she should not cut at all, there is no doubt that would have been good. There is not a doubt that the tes-

(1) *Sloman v. Walter*, ante, 1 vol. 418.

(2) Mr. Cox's note to *Berwick v. Whitfield*, 3 P. W. 268.

(3) Vide S. C. 1 Ves. 524, and the judgment from Lord Hardwicke's notes, 1 Dick. 182, 183, with the decree from Reg. Lib. Supplement to Vesey, 233.

tator might restrain cutting for botes, although they are incident to the life estate, if not excepted; they may be severed from it. So a reservation not to cut underwood in a particular close, or not to plough up a particular field, would be valid. There is nothing clearer than that the intention of the testator was, that his widow should not cut either timber or underwood for sale. If she had threatened to cut underwood, the Court would have granted an injunction to restrain her. Suppose a man in his *will, first, to give an estate without impeachment of waste, [*543] and then to say, I mean that he should not commit voluntary waste, the restriction would be good, and the party would be restricted to permissive waste. Nothing is said as to the consequence of cutting; the money produced by the underwood must be part of the estate.

Mr. Justice Buller.

The first point is, whether there is any ground of distinction with respect to the different periods for which the account is sought. It is insisted, on the part of the defendants, that it is against conscience to call for the value of what was cut during the first period: but if she cut the underwood and sold it wrongfully, her estate has been increased by it, and therefore there is no reason why the account should not extend to that.

Upon the merits, there are two questions. First, whether her representatives are accountable to any body: Secondly, whether they are accountable to the present plaintiff.

The first question depends on the words of the will, by which she is at "full liberty to cut timber or underwood for repairs, or for her own use, for fuel or otherwise, but not to sell." It seems as if he meant not to restrain any power which she had as tenant for life, but to give her further right. He meant she should have timber for her own use, which she would not be entitled to as bare tenant for life; and so far the clause is sensible; but the same reasoning does not hold with regard to the underwood; because, as to that, she would have a right to it from the nature of her estate. He meant to enlarge, not to diminish, her interest. There is no provision as to the consequence of her cutting, so that it amounts only to a recommendation to her not to cut for sale. I therefore conceive her estate not to be accountable to any body, for the underwood cut and sold. [But it is not necessary to decide that, if the second point is against the plaintiff; and that point, I think, is against him.] (4)

But the second question is perfectly clear, that, if accountable at all, she is not so to the present plaintiff: he is not entitled. To say that the Court would have granted an injunction to restrain her from cutting, at his suit, is begging the question. Mr. Lloyd puts the case, that the testator had given an estate for *life, without impeachment of [*544] waste, and had afterwards excepted voluntary waste; but that is not like this case, because giving the estate without impeachment of waste, was an addition to the estate for life, which might be restrained as to the extent of it. Here, the words added, do not increase the interest as to the underwood, but leave that as it was. The heir, in this case, never could have a right to recover for a breach of the condition; for all the interest is disposed of. Then the question is, whether the plaintiff, who is tenant for life without a power of committing waste, has a right to underwood cut before his estate commenced. The law is clear, that a tenant for life without impeachment for waste, cannot maintain an action

(4) From the Report, 1 Ves. jun. 493.

of trover for timber cut before his estate into possession. (a) Then how will it be, as to underwood, during the life of a tenant for life impeachable for waste? The tenant for life has a right to cut underwood; but if he leaves it uncut, it goes with the inheritances. Here the plaintiff had no interest in the timber or underwood during the life of Lady Say and Sele. If there is any title to the account, it must be in the owner of the inheritance. (b)

Bill dismissed with costs.

(a) So in *Pyne v. Dor*, 1 T. R. 55 (which is probably the case from the Home Circuit, alluded to in Mr. Vesey's report, though there is some inaccuracy, either in the recollection of the learned judge, or in the report of what he said), it was determined that trover could not be maintained by a tenant in tail expectant on the determination of an estate for life without impeachment of waste, for timber which grew upon and was severed from the estate. In *Blake v. Aynscombe*, 1 N. R. 25, where trustees under a settlement were tenants *pour autre vie*, this action was also held not maintainable. In the late case of *Williams v. Williams*, 15 Ves. 419, an interesting and difficult question arose upon this subject; lands of the husband had been settled upon himself for life, without impeachment of waste; remainder to the wife for life for her jointure; remainder to the issue of the marriage in strict settlement; remainder to the heirs of the body of husband and wife; there being no issue, the question was, whether the wife, who survived, was entitled to cut timber, and to the property of it, when severed. Lord Eldon then stated the distinction between that case, and those where tenant in tail after possibility of issue extinct, had been held to be unimpeachable of waste: those cases having been determined on the inheritance having once been in such tenant, which was not the case under the present settlement. The Court of King's Bench, however, afterwards, upon a case directed, certified that she was tenant in tail after possibility of issue extinct; 2dly, that she was unimpeachable of waste; and 3dly, entitled to the property of the timber, when severed. 12 East, 209. — *Eden*.

(b) See *Pigot v. Bullock*, 1 Ves. jun. 479, and note to this case in 1 *Hovenden*, Supp. 193 — 197; *Eden* on Injunct. (2d Am. ed.) 202, 203; *Livingston v. Reynolds*, 26 Wend. 115.

DANIEL v. MITCHELL. [S. C. 1 Ves. 484.]

(Reg. Lib. 1791. A. fol. 297.)

Practice. Plea [of a former suit depending, need not be set down for argument; but the plaintiff may move for a reference to the Master, as to the truth of the fact.] (1)

To this bill, the defendant pleaded a former suit depending for the same matter. Before the plea was set down to be argued, Mr. Steele moved, on the part of the plaintiff, that it might be referred to one of the Masters of the Court, to look into the bill, and into the defendant's plea, and the bill in the said plea mentioned to have been exhibited by the plaintiff against the defendant, and the proceedings therein, and to certify whether the said bill, formerly exhibited, is for the same matters as the complainant's bill in this cause; and whether the same is now depending; and he cited, in support of his motion, 1 Vern. 332.

LORD CHANCELLOR at first thought the plea ought to have been set down, but Mr. Steele observing, that setting the plea down would have been an admission that the former bill was for the same matter, His Lordship

Granted the motion. (a)

(1) This practice is enjoined by the ancient orders of the Court, of which Lord Thurlow seems not to have been aware. See *Beames's Ord. Ch.* 176, 177, and the reason given is, that it is to be verified *sub pede sigilli*. See also *Beames's El. Pleas*, 144, et seq., with the various authorities.

(a) 1 *Barbour*, Ch. Pr. B. 1, ch. 6, § 4, p. 125, 126; 1 *Smith*, Ch. Pr. (Am. ed.) 234; 2 *Madd.* Ch. Pr. (4th Am. ed.) 315.

*ASTLEY v. The Earl of TANKERVILLE. [*545]

Between FRANCIS DUGDALE ASTLEY, Esq. and JOHN FLETCHER, Clerk, JOHN BRIDGWOOD, Gent. (surviving Executors of the late Sir JOHN ASTLEY, Bart. deceased), and JOHN CARR, Esq.,
Plaintiffs.

The Right Honorable CHARLES Earl of TANKERVILLE, and CHARLES AUGUSTUS BENNET, commonly called Lord OSSULSTON,
Defendants.

11th May, 1784. 24th May, 1792.

(Reg. Lib. 1791. A. fol. 411. b.)

Husband and wife levy a fine of the wife's estate, and settle the same with a power to them to revoke, and declare new uses; they afterwards join in a mortgage term, to secure a sum redeemable on payment by the husband, or the persons to whom the freehold should belong: the mortgage was paid off, and the term assigned to a trustee, to such uses as the husband should appoint: he afterwards (without the wife) borrows a further sum, and makes the term a security, and the trustee joins in the assignment: the husband by will, orders his personal estate to be applied in payment of debts, except those secured upon mortgaged estates: this is the husband's debt, and shall be paid by his personal estate, not by the mortgage-term. (1)

Devise of copyhold subject to a mortgage, not sufficient to exonerate the personal estate from the payment of the mortgage-money. (2)

By indenture tripartite, dated 23d of October, 1716, Sir John Astley for himself and Lady Astley, covenanted with trustees to levy a fine (which was afterwards levied), and to settle estates in Abbey Foregates, Longdon, &c. (which were estates held in right of Lady Astley), to the use of Sir John for life, remainder to trustees to preserve, &c.; remainder, as to part, to Lady Astley for life; remainder as to other part, to trustees for a term to pay Lady Astley an annuity; remainder to trustees for a term, to raise portions for younger children; remainder to first and other sons (with other intermediate remainders); remainder to Sir John and Lady Astley in fee, with a power to Sir John and Lady Astley to revoke the present and limit new uses. On the 23d of June, 1725, Sir John and Lady Astley joined in a conveyance, by way of mortgage for 500 years, of the premises, to Holden for 3000*l.*, with proviso for redemption, on payment by Sir John Astley, his heirs, executors or administrators, or such other persons to whom the freehold and inheritance of said premises should belong. On the 24th of September, 1734, the mortgage was paid off, and the term assigned by Holden to Cotes in trust, for such uses as Sir John Astley should by deed appoint, and for want of such appointment, *to attend the inheritance. (Lady Astley was not a [*546] party to this deed.) On the 12th of May, 1747, Sir John Astley borrowed of Messrs. Hoare & Co. 3000*l.* on his estate, and Cotes, by his appointment, assigned the term to them as a security, and Sir John Astley covenanted to pay the money.

In 1753, Sir John and Lady Astley, having several children (and among them Alicia, Countess of Tankerville, mother of the defendant), they by indenture, 4th of June, revoked the uses of the former settlement, and limited the estates, after the death of Sir John Astley, to Lady Astley for life, remainder to Richard Philip Astley, their eldest son, for life, remain-

(1) See *Clinton v. Hooper*, ante, 201, with the Editor's note; 1 *Roper on Bar. & Feme*, 143, 143, et seq.

(2) See Mr. Cox's elaborate and useful note to *Evelyn v. Evelyn*, 2 P. W. 664, et seq.

der to trustees to preserve, &c., remainder to first and other sons; remainder to secure to Alicia, Countess of Tankerville, a sum of 500*l.* a year; remainder to defendant the Earl of Tankerville for life; remainder to his first and other sons; remainder to the second and other sons of Lady Tankerville; remainder to Sir John and Lady Astley in fee.

Sir John Astley afterwards bought in several copyhold estates, held of the manor of Longdon, of which he was lord, which were surrendered to him, and afterwards conveyed them to Edward Lloyd, as a security for 1000*l.* borrowed of him.

Richard Philip Astley and Lady Astley both died in the lifetime of Sir John Astley. The 3000*l.* continued unpaid to Messrs Hoare. Sir John Astley, the 18th of May, 1681, made his will, and therein ordered, that his personal estate, not otherwise disposed of, should be applied in payment of his funeral expenses, debts and legacies, except such debts as were secured upon, and might affect any of his estates in Abbey Foregates, Longdon, &c., whereof he was not seised in fee-simple (meaning the estate in mortgage to Hoare), and devised the copyhold estate he had purchased in, subject to a mortgage for 1000*l.* and interest for the same to Edward Lloyd, to defendant the Earl of Tankerville in fee, and gave the residue of his personal estate to his executors, to be laid out in the purchase of lands for the benefit of the plaintiff Astley and his issue male.

The executors, after the death of Sir John Astley, paid off the mortgages to Hoare and Lloyd, and took assignments to Carr, as a trustee for them.

[*547] *Sir John Astley dying without issue male, Lord Tankerville, under the limitations in the settlement of 1753, took possession of the estates settled thereby, and also of the copyholds as devised under Sir John Astley's will.

Plaintiff Astley brought ejectments on the demise of Carr, in order to get possession of the premises contained in the 500 years' term, and of the copyhold estates. The cause came on to be tried before Mr. Justice Buller, at the Summer assizes, 1780, for the county of Salop, when the Judge was of opinion, that Sir John Astley had no right to charge the freehold estate with the 3000*l.*, and therefore it ought to be paid out of his personal estate; and being also of opinion that plaintiff Carr had no legal title to the copyhold, he was nonsuited.

And the plaintiffs filed this bill, insisting that the testator had manifested his intention that the 3000*l.* should not be paid out of his personal estate, but remain a charge upon the freehold lands; and that he had devised the copyhold to defendant Lord Tankerville, subject to the mortgage of 1000*l.*, and therefore that, having paid the mortgages, they ought to be repaid by Lord Tankerville, or to have a satisfaction out of the copyhold: and prayed that he might elect, either to pay the said two sums of 3000*l.* and 1000*l.*, or give up the copyhold premises.

Lord Tankerville, by his answer, insisted that Sir John Astley being seised only in right of Lady Astley, had no power to charge the freehold with the 3000*l.* borrowed of Hoare, without Lady Astley joining in the deed, and therefore the estate ought not to be charged with the same under the will, and that the testator did not mean to make the copyholds liable to the debt to Lloyd: and therefore submitted, that if plaintiff Astley had paid off the same, he ought not to be reimbursed.

The cause came on to be heard 11th May, 1784.

Mr. *Mansfield*, for the plaintiffs, contended, that Sir John Astley had a right to charge this freehold estate; and having, by his will, made it liable

for the mortgage-money, his personal estate was thereby exonerated. The estate was not Lady Astley's; he was more owner of the estate than she was. He was tenant *for life, unimpeachable for waste, [*548] and, as such, might cut timber, and under the power he could mortgage the estate. By the will he has charged the Longdon estate; otherwise, the exception means nothing. With respect to the copyholds, they were given subject to the mortgages, and therefore ought to be charged with them, and not paid out of Sir John Astley's personal estate.

Mr. *Scott*, and Mr. *Partridge*, for the defendant, Lord Tankerville, and Mr. *Attorney-General* (Arden), for Lord Ossulston.

The intention of Sir John Astley in the will was, to charge the settled estate with the mortgage-money; but that he could not do. Where a husband and wife levy a fine of the wife's estate, and raise money for the use of the husband, though the estate is a pledge for the debt, yet the husband's personal estate is liable, and the estate pledged is no further liable than as such. Lord Huntington's case, 2 Vern. 437; 1 Bro. P. C. 1; *Tate v. Austen*, 1 Wms. 264; *Bagot v. Oughton*, 1 Wms. 357. Here, by the payment of the original mortgage, the charge was at an end, and the assignment to Cotes was in trust to attend the inheritance. The term was then completely at an end, and, in order to revive it, Lady Astley must join in the instrument. Thirteen years after, Sir John Astley, without the intervention of Lady Astley, borrows 3000*l.* of the Hoares, upon the security of this estate, and the trustee joins in the conveyance; but this assignment was not a good execution of the power. Then the personal estate must pay it as his personal debt.

With regard to the copyholds, they contended that the words *subject to a mortgage*, would not prevent them from being exonerated by the personal estate; such words do not show that the devisee is to be liable to pay the mortgage-money. *Serle v. St. Eloy*, 2 Wms. 386. There is no pretence for the plaintiff Astley, who is to take so large an interest in the lands to be purchased, to insist that the copyhold should bear the 3000*l.* charge, and that he should bear no share in respect of the estates devised to him.

Lord CHANCELLOR, during the argument, seemed strongly of opinion that, notwithstanding Lady Astley joined in the mortgage, *the [*549] debt continued to be the debt of Sir John Astley, but ordered the cause to stand for judgment, which it did, till 24th May, 1792, just previous to his Lordship's resignation, when he ordered the bill to be

Dismissed without costs. (a)

(a) See *Ram on Assets*, ch. 29, § 1, p. 357, et seq., 263, 264; *Clinton v. Hooper*, ante, 209, 214, note (a); *Tate v. Austen*, 1 P. Wms. 264, and Mr. Cox's note.

CHAMBERL[A]YNE v. DUMMER. (1)

In Court, Hil. 1785. Lincoln's-Inn-Hall, 1st, 4th Feb. 1785 ; 24th May, 1792.

(No entry on this occasion.)

Tenant for life, with liberty to cut timber at seasonable times, is not to cut trees planted for ornament or shelter to the mansion-house, or saplin trees, not fit to be cut or felled for timber. (1)

THOMAS DUMMER, Esq., made his will, and thereby (among other things) "devised his real estates, situate at Cranbury Woolston, and Baddesly, in the county of Southampton, to the defendant, his wife, Harriot Dummer, for life; and, in case of her death, to Elizabeth Holland, for life, remainder to the plaintiff, William Chamberlyne in fee."

The testator, just before his death, made two codicils to his will: the words of the first codicil were, "It is my request that my dear wife should keep up and occupy my several mansion-houses, &c. in the county of Southampton, in such manner as we have hitherto done." The words of the second codicil, dated 12th of February, 1781, and which was the most material to the present suit, were these: "Whereas I have devised my estates, by my last will and testament, as therein mentioned, and my dear wife, Harriot Dummer, has no power to cut down any timber; now, I give unto my said wife for, and during so long time as she shall continue my widow, full power and authority to cut timber upon any part of my estate, for her own use and benefit, at all seasonable times in the year; anything in my said will notwithstanding."

Mr. Dummer died in June following, 1781, seized of the said estates devised as aforesaid, to the amount of 5000*l.* per annum, and upwards. He had, in the county of Southampton, three several mansion-houses; and, upon the estate where he chiefly resided, called Cranbury, there were several large plantations of trees about the house, in pleasure-gardens and lawns, consisting of 200 acres. He had another mansion, called Woolston, a less house than Cranbury (in which he occasionally resided), about which were some small plantations. And a third house, called

Baddesly, which he rarely or never inhabited himself, the testator [*550] having lent it to the plaintiff, Chamberlyne: it was burnt down, but afterwards rebuilt upon a less plan; and about this house were some small plantations of elms, &c.

The plaintiff filed the present bill against Mrs. Dummer, charging that she had cut down a great many trees which had been planted for shelter and ornament to the mansion-houses, and which stood in the lawns, gardens, and pleasure-grounds belonging to the testator; and also great numbers of saplins and timber trees unfit to be cut; and praying an account of such timber so cut, and satisfaction for the same, and an injunction to restrain the defendant from committing waste and destruction upon the estates.

Soon after the filing of the bill, the plaintiff moved for an injunction. The proceedings on that application are reported vol. i. p. 166.

The defendant, Mrs. Dummer, had since married ——— Dance, Esq., who had been properly brought before the Court.

The cause came on to be heard in Hilary term, 1785.

Mr. *Mansfield*, on the part of the plaintiff, insisted that the power given

(1) See this case, *antea*, 1 vol. 166, 167, 169, with the Editor's notes.

by the codicil was not an absolute power, much less expressed in such general terms as without impeachment of waste; but that it was a limited power, so long as she should remain his widow, to cut timber for her use and benefit, and upon this power her right was founded.

That Mrs. Dummer, under this power, in the summer after the testator's death, as the evidence shows, sent for her surveyor, and directed him to mark timber for cutting, so low as four feet cubic of timber, to the amount of 12,000l. She ordered timber to be cut round the mansion-house at Cranbury, except such trees as were close to the house. That Mrs. Dummer, according to the evidence, understood this to be a full and absolute power to cut down every tree, except what was close to the house; and that, pursuant to her orders, trees, not merely timber-trees, but those standing in avenues, walks, pleasure-grounds, gardens, and lawns, have been cut down, to the amount of 11,000l., and some of *which were young oaks, not worth more than 3s. per tree; [*551] and much more would have been cut, had she not been restrained by the injunction of this Court. Mrs. Dummer derives no such power under this will, and the decree, in this case, should be similar to that in *Aston* and *Aston*, 1 Vesey, 264, for satisfaction for those trees which ought not to have been felled, and had been so, in an unreasonable and unhusband-like manner: that was a case stronger than the present, because the party was tenant for life, without impeachment of waste.

In order to support Mrs. Dummer's right, it must be contended that this power, during her widowhood, meant no limitation, but that, if she remained a widow for six months, she might have stripped the estate: but it is only a power of cutting, in a reasonable way, timber which is fit to be cut.

Lord CHANCELLOR. The question ought to be, whether the tenant for life has cut down timber which a tenant in fee would have thought it unreasonable to do; so as to show that the timber has been cut down in an unhusband-like manner, as in *Aston* and *Aston*; therefore I must hear the evidence for that purpose.

Mr. *Mansfield*. There is another case material to be stated. Lord *Castlemain v. Craven*, 2 Eq. Abr. 758 (also 22 Viner, 523), the decree there was, that Lord Craven should account to the plaintiff as tenant in tail.

Mr. *Scott*, on the same side.

The interest Mrs. Dummer had, under the will and codicil, does not amount to the same interest as tenant for life without impeachment of waste (since *Lewis Bowles's* case, 11 Coke's Rep.). His first codicil containing a special direction, that she should keep up and occupy the houses in the same manner as the testator had done; a testator leaving such a direction could not mean, she should strip the house of such trees as were for shelter or ornament; which he intended she should keep up, as he had done in his lifetime: he has not made her absolute tenant for life, without impeachment of waste, for he has used these words, "at all seasonable times in the year." Supposing the testator to have omitted "at seasonable times," could Mrs. Dummer, *intending to [*552] marry within one week afterwards, cut down every piece of timber as tenant for life without impeachment of waste could have done? Supposing her to be tenant for life without impeachment of waste, &c. she would not then have had the power to cut unthriving timber; though a person, having such an interest, might have cut what was thriving. The testator meant the reversioner should have a chance for those trees, and

that his widow should only cut, at what the reversioner might deem reasonable times.

LORD CHANCELLOR. Do you mean, by reasonable times of the year, that particular period at which you might make the best advantage of the timber, or any thing more?

Mr. Scott. That, and something more; for that expression must mean, not merely the cutting at a proper time, but the cutting it at such a time, in such quantities, and in such manner, as not to injure the growing timber. Mrs. Dummer must, according to the testator's intention, have had such a power as that in Lord *Castlemain v. Craven*: that was a power, with consent of trustees, to fell timber; it was as large a power as can be insisted on the part of Mrs. Dummer; and consequently the having such a right, and abusing that right, by injuring the estate, a court of equity will repair that injury, by an account of, and satisfaction for, the damnification, or some remedy in that form. This appears from the tenor of former decrees, and the terms in the orders in the old books; in which it appears, that the Court satisfied themselves with a great latitude, in framing such orders.

From Sir H. Packington's case, 3 Atkyns, 215, it appears, if a single tree is cut down in lawns, pleasure-grounds, or gardens (which equity will protect, though the law does not), it is a sufficient ground for an inquiry before the Master, as to the value, &c. It is stated, that in that case there were only three oaks cut (this appears otherwise by the Register's book); but in the present case, a large number have been cut down. An intention of waste appears from the evidence; and that many more would have been cut, had not the injunction of this Court prevented it. There must be another point of inquiry before the Master, as to

what trees have been cut down, which were for shelter or ornament. [*553] In the case of Lord *Cardigan v. the Duke of Montague*, before Lord Northington, it was held, that supposing it to be an antique lawn, yet the Court must protect the trees in the shape the testator left them, though ever so contrary to the present taste; and notwithstanding it is proved in evidence, that the cutting or removing them is an improvement, yet such an act, in this Court, shall be considered as waste.

LORD CHANCELLOR. The reference to the Master should be confined merely to the timber trees; that must have been the utmost extent to which the Court has gone.

Mr. Scott. The cases are material, and we must apply the principles of them to the present instance; that equity will give an account of the value of the timber trees, and a satisfaction for the damnification suffered upon the estate; if the plaintiff is entitled to a satisfaction, he must be so, to have an account of the value of the trees cut down. In Packington's case, lawns, avenues, and ridings, are mentioned.

LORD CHANCELLOR. I would not send a loose reference to the Master, it ought to be as precise as possible; I should wish to relieve the Master from the necessity of construing, what is meant by unhusband-like manner.

Mr. Scott. Suppose the inquiry was to be confined to what timber was thriving or unthriving, as in *Castlemain v. Craven*; in that case, the Court held, that, notwithstanding the consent of the trustees had been given, the party had no power to cut thriving timber; and directed an account, considering the reversioner entitled in equity to the value, which was to be paid accordingly; so that the principle must be this,

that the tenant for life has a power to cut down unthriving timber, but, in respect to what is thriving, the tenant for life shall not have the benefit before the reversioner: and it appears that, upon a direction to take an account of thriving timber, it is a fact sufficient to be ascertained by the Master, or a jury, as a matter competent for either to judge of.

Lord CHANCELLOR. Suppose the trustees had consented, in *Castlemain v. Craven*, the question would have been, as such timber *has been cut down by their consent, is it not breach of trust to [*554] consent to the cutting of timber, which tends to the destruction of the estate, and not suffering the timber to grow to a proper maturity? There may be doubts as to which is thriving and unthriving, and that is a singular case, and by no means a guide as to the present instance. It is not sufficient to establish a rule: for the Master of the Rolls, there, went, not upon general principles, but upon the terms of the trust. As to the term husbandlike, though I know its meaning when applied to agriculture, I confess I do not, when applied to the felling of timber.

Mr. Scott. If a charge is carried in to the Master, the plaintiff must support it by evidence of persons skilled in the knowledge of timber.

Lord CHANCELLOR. What is in law held timber, is what is deemed so by the custom of the country; which must appear from evidence. By husbandlike manner, do you mean what part of the timber it would have been of advantage to the tenant in fee to cut down, meaning to make use of it in an useful manner? Supposing a tree of improper growth for building a house, is the cutting of that waste? If you take the word in that sense, its meaning must be construed according to the judgment of builders.

Mr. Scott. The terms of the injunction granted by your Lordship are these, to restrain from cutting any timber or trees, which were planted for shelter or ornament to the houses; which were the terms used in *Obrien v. Obrien*.

Mr. Holist, on the same side. There is sufficient evidence to support a reference to the Master. There are two points, first, as to the cutting down trees about the houses, or which were planted in pleasure-grounds, gardens, or lawns. Secondly, as to the general cutting timber off the estate. According to the former authorities, the Court is not to be guided by their judgment, in respect to what is ornamental or not, as to the taste of the times, but what was deemed and preserved as such by the ancestor; and which ought to be continued in the same style and situation as he left them: as in the old cases *Williams v. Gay*, 2 Chan. Cas. 32; and *Vane v. Lord Barnard*, 2 Vern. 738, and *the [*555] modern ones of *Obrien v. Obrien*, and *Cardigan v. Duke of Monmouth*. As to the question of cutting timber generally, Mrs. Dummer has misused her power, which is not so full a power as that of a tenant for life without impeachment for waste, being only during widowhood, and at seasonable times of the year; it was the testator's intention that Mrs. Dummer should cut timber in a fair manner, as he himself would have done. With respect to a reference, the burden lies upon the plaintiff; he must produce evidence sufficient to support the charge before the Master; and if he fails in that respect, the reference will be useless. In *Aston v. Aston*, an account was directed of all trees. The profits of the thriving timber ought to go to the plaintiff, as in *Garth v. Cotton*, 3 Atk. 751; and *Williams v. Duke of Bolton* (Cox's note on 3 P. Wms. 268); in the latter case, the Court would not suffer the Duke to profit by his

own wrong, but ordered the money arising from the sale of such timber to be paid into the Court for the benefit of the remainder-man, if one should come *in esse*.

Mr. Attorney-General (Arden), for Mrs. Dummer.

The question is, what power Mrs. Dummer derived under her husband's codicil; the meaning of which, though it is inaccurately penned, is extremely clear. If she has not exercised that power, in any instance, wrongfully, the bill should be dismissed with costs. By adding this codicil, the testator meant to prevent litigation; and this power is adequate to that of a tenant for life without impeachment of waste. The testator intended to give her a power of cutting timber, so long as she should continue a widow; which shows that he left the exercise of this power to her discretion, and that she should not be restrained, till after a future marriage. It has been said by Lord Hardwicke, that when a testator leaves an estate to one tenant for life, with remainder over, his intention is to leave the thing he himself enjoyed; and all the benefits which the testator held with it, would, of course, belong to such person, from the nature of the thing itself; and therefore, in *Aston v. Aston*, Lord Hardwicke made the distinction, and he has never used the words saplins as being unfit for timber. Notwithstanding what has been suggested on the other side, the Court have never gone so far as to restrain the party from cutting trees, which were standing in lawns or pleasure-grounds (at large); but the injunction has been confined [*556] merely to those which served as shelter or ornament to the house;

equity has never enjoined a tenant for life, without impeachment for waste, from exercising that power in the fullest extent, in respect to all trees that could be called timber, and has only prevented the party from doing what would destroy the thing devised, and hinder its being enjoyed as the testator intended it should be. It never was Mr. Dummer's intention that the plaintiff should have all the timber which at that time was growing to maturity: if he had so meant, the instructions given to Mr. Chamberlyne, for his codicil, and which were proved in the cause, would have been to that effect. In *Piers v. Piers*, 1 Vesey, 521, Lord Hardwicke said the Court would not interfere, but in the case of spoliation or destruction: where things have been destroyed, which were necessary for the enjoyment or the existence of the thing devised, the Court has interposed, as in Lord Barnard's case. The party shall not use that power wantonly or maliciously without benefit to himself, or with benefit, if it tends to the destruction of the thing itself. As to Packington's case, Lord Hardwicke left out that part of the order, which mentioned trees of an improper growth, because of disputes: the law would not permit him to make such order. Mrs. Dummer has a right to cut anything that is timber. A tree containing four cubic feet of solid timber, is generally called a timber tree.

Lord CHANCELLOR. In the old books the distinction taken is between twenty years' growth and what is *sylva cædua* (or under twenty years); for when twenty years growth it was deemed timber.

Mr. Attorney-General. In *Leighton v. Leighton*, in 1747 (cited ante, vol. i. p. 167), the mansion-house being out of repair, the father cut down all or the greatest part of the timber upon the estate, or such part as was become a shelter or ornament to the mansion: the order was, that the defendant should be restrained from committing any waste or spoil upon the estate, &c., there was no order to restrain the party from cutting thriving timber. *Aston v. Aston*, is a strong case in favor of Mrs. Dum-

mer; the circumstances of it were extraordinary: where the party cuts down so much timber, that there would not be sufficient for the repairs of the estate, there the Court will interfere, and consider it as waste committed in an unreasonable and unhusbandlike *manner: [*557] in that case Lord Hardwicke went upon the settlement. In the next case, of *Obrien v. Obrien* (cited antea), which was only upon an injunction and not upon the hearing, it was confined to trees intended for shelter or ornament, and to prevent the cutting saplins not proper to be felled. *Castlemain v. Craven*, was a case of a trust, and not analogous to the present instance, as it was determined upon the ground of its being a particular trust. As to satisfaction for what has been cut, in respect of shelter or ornament, it is an unwarrantable request on the part of the plaintiff, and no case to warrant such a demand. There is no proof of Mrs. Dummer cutting any saplins; as to the trees upon the lawns which have been cut, they did not constitute a part of the shelter or ornament. If there is any doubt as to evidence, the parties must have an issue.

Mr. *Morris*, on the same side.

This is a special grant, and not like the case of tenant for life without impeachment of waste. Supposing the party had cut down timber not fit for repairs, and improper to be cut; if no injunction had been applied for, could a bill have been sustained in equity for an account of the value and satisfaction for such timber? Consider the effect of the statutes of waste, the statutes of Marlbridge and Gloster, and the statute of Westminster. In this case, the trees so cut by Mrs. Dummer, were her property, and no more than a prudent owner would cut. The term "thriving" is a vague term. What is meant by "all seasonable times" of the year, is, that the party should not cut when the sap is up; the trees being firmer and better when the sap is down. She might have cut the whole in the next winter, under this power. Every thing must be timber, which can be applied to the use of building of houses or ships, &c. A party has been restrained from cutting saplins, as destroying the thing itself; no case can be produced, where tenant for life without impeachment of waste has been restrained from cutting thriving timber. *Castlemain v. Craven* does not apply: the word *unthriving* is there used with reference to the consent of the trustees. There is no case, where the Court has decreed a satisfaction; though the Court will grant its injunction, it will not direct an account of the damages done: and though the Court might have restrained the party from cutting, it will not oblige the party to pay for what has been cut. No man has *been compelled by this Court to [*558] account for what was his own. *Bishop of London v. Webb*, 1 P. Wms. 527. As to *Cardigan v. Montague*, that was a matter of partition between two tenants for life, and remainder-men in tail, where they held in moieties; a bill not merely for an injunction, but to prevent an alteration in the estate. [Lord Chancellor held it did not apply.]

Mr. Serjt. *Rooke*, on the same side.

This is rather a question of satisfaction for damages done upon the estate, than of prevention; Mrs. Dummer's power became extinguished on her marriage with Mr. Dance. By the proofs in the cause, it appears there is a large number of trees still remaining upon the estate; there is no authority whatsoever to say that Mrs. Dummer has gone to the extremity of her power; there will be a considerable quantity of timber upon the estate before Mr. Chamberlyne can have the property in his

possession. As to the words "*all seasonable times of the year*," they are nugatory words, for if the timber is not cut at a seasonable period, it will not fetch its proper value; and whether cut at seasonable times or not, the remainder-man is in the same situation; the words *full power and authority* imply, that the testator meant to leave her to her own discretion, to sell or convert the timber to any use she pleased: as to the word *timber*, we claim nothing but what is timber. The word *timber* may be used in several senses, as between vendor and vendee, just as the parties shall construe; or, as in a legal one, in opposition to the *sylva cædua*; and though the distinction may hold as to twenty years' growth, between ecclesiastic and layman, it does not between timber-merchants; for they regard the size, as much, if not more, than the growth of timber: the size of old timber ought to be the criterion to decide by, and though a tree may be of twenty years' growth, if under size, it is not deemed timber; four feet solid is a timber tree, and so it is proved, and there is no contradictory evidence as to that point, on the part of the plaintiff; all the books upon the subject agree, that two feet circumference and six inches and one fourth girth constitute the proper dimensions. This appears by Hutton and Robinson's books of mensuration. As to what the party has cut under those dimensions, it is very trifling, not amounting to ten ash, or so small a number as not to be worth a reference to the Master: the trees that she has taken away, which have been but very few, were for the sake of improvement. She cannot be compelled to pay the [*559] plaintiff for them. She has as full a power as a tenant for life without impeachment of waste, and such a tenant may cut down the trees, even in lawns and pleasure-grounds, which are not ornamental. No waste or spoil has been committed by Mrs. Dummer; but, on the contrary, it is proved she has improved the house and gardens by cutting away some trees, which made the house damp, and obstructed the light, &c. No wanton spoil has been done, and she ought not to account. As in *The Bishop of London v. Webb*, and *Rolt v. Somerville*, no satisfaction was decreed to the remainder-men, for what had been cut down; only an injunction from further cutting, granted; so far from having cut the trees in an unhusbandlike manner, the evidence speaks the contrary, and that no wanton wilful waste, or unnecessary damage, has been done: she has acted in the most cautious manner, particularly in respect to those trees which were ornamental, as appears by her direction to the surveyor. As to *Aston v. Aston*, that was a case where a tenant for life had absolutely stripped the estate; Packington's case, was of threats so to do, by the father to the son. There is nothing in this case to keep Mrs. Dummer in a state of litigation.

Mr. Mitford, on the same side

The question is, as to the power Mrs. Dummer derived under her husband's codicil; and, in order to understand the extent of such power, Mrs. Dummer's situation, previous to his adding this codicil, must be considered. By the will, the testator had made her barely tenant for life; no freedom from impeachment of waste, or any such privilege, was given her by the will. By the common law, tenants in dower, and guardians in socage, though they had an interest in the estate, had not the privilege of waste; and a writ of prohibition of waste lay against such parties: as to all other persons, except in those cases, no distinction was made by the common law between an absolute fee and a limited estate, in respect to waste, till the law interfered, when the statutes of Marlbridge and Gloster gave a remedy against the lessee for life, or for years. In Lewis Bowler's

case it was held, that tenant for life, without impeachment of waste, had a full power over the estate and entire property during life. (3) The statute of Marlbridge only gave single damages, that of Gloster treble, against the lessee for life, years, and by the curtesy: the only remedy before, against tenant by curtesy, was by a writ of *prohibition; [*560] and no damage could be recovered prior to the statutes. Upon a doubt whether the party was answerable for waste till after the writ of prohibition was delivered, the statute of West. 2, gave damages for waste, before the writ delivered. By Mr. Dummer's will, Mrs. Dummer was tenant for life only, and therefore impeachable for waste; but, by the codicil, she has power to cut timber, and with no restriction, except such as the words, "at seasonable times," &c. may impose upon her. The only doubt is as to the meaning of the word timber, and what trees she has authority to cut under this clause. To construe this word, we must revert to the case of tenant for life without impeachment of waste. Respecting the power such a person has to cut timber, and what kind of timber such person may cut,—such a tenant might cut trees which are not denominated timber. The age of trees is not always to be regarded; for if the trees are a seasonable wood, they may be cut as timber under twenty years' growth, as is said in the old books. Brooke's Abridgment, tit. Waste; Fitzherbert's Nat. Brev. 59. Custom may determine it. By the will, Mrs. Dummer had power to cut down all coppice and wood usually cut. She had a right to cut seasonable wood, and such only has she cut; but no power to cut down trees which were commonly called timber trees, and which a tenant for life cannot cut. By the codicil she has a power to cut everything which she had not power to cut by the will. Notwithstanding, the plaintiff contends she is only to cut some, and not all. If she is to cut some, where is the line to be drawn? It is a matter of difficulty to do that; it is a general power, and the use of the word timber implies that she may cut down everything which is timber. Supposing the testator not to mean all timber; the supposed sense must be, such trees as tenant for life, not impeachable for waste, is commonly supposed to have a right to cut. It is to be presumed that the testator used the word timber in the vulgar, and not in the legal sense. (Mr. Mitford then observed upon the evidence, much to the same purpose as the counsel before him.) If the tenant for life, without impeachment of waste, clears the wood of the rotten timber, it is good husbandry, as it promotes the growth of the other trees. There is evidence to that purpose. The power of this Court is discretionary, and must be applied to former cases. The first case is *Abraham v. Bubb*, 2 Freem. 53; 2 Eq. Ca. Abr. 757; it shows only that mischievous waste ought to be restrained, and the Court might moderate that power which the law gives: *no [*561] very precise rule is laid down, which shows that the Court's interference is purely a matter of discretion. There is another case before Lord Nottingham, 1701, *Cook v. Whaley*, Eq. Abr. 400, and another case of *Williams v. Day*, 2 Ch. Ca. 32, a woman tenant in tail, after possibility of issue extinct, restrained from cutting in particular parts of the estate, because it seemed malicious. From these cases, it seems, the Court will never interfere, unless a malicious intention appears in these cases. But still the timber cut was not treated as the property of the remainder-man;

(3) See this subject much discussed in the recent case of *Williams v. Williams*, 15 Ves. 419, et seq., and 12 East, 209, &c., where it was determined that the wife, who was to be considered as tenant in tail of the husband's estate after possibility of issue extinct, had a consequent privilege of legal waste, and property in the timber when severed.

there was nothing more than an injunction. The next case is *Vane and Barnard*, 1 Salk. 161, 2 Vernon, 738; it is considered as a leading case: it is there said, the clause without impeachment of waste is never extended to the destruction of the thing itself, but only to a fair enjoyment of it; and in *Salkeld*, it is said, an injunction was granted, because of the abuse of the power, and derogatory to the grant. In Lord Somerville's case, 2 Eq. Abr., groves of trees were cut down, but the result of the case was, that the plaintiffs could not have the value of the timber; but the Court would restrain such practice. Sir Herbert Packington's case was the case of an injunction merely. It was admitted by the answer, that many trees had been cut down, though the reporter erroneously states only two or three oaks. No claim was made of the trees so cut down. *Leighton v. Leighton* was an injunction merely to restrain the defendant from waste or spoil, and not from cutting the trees. (Lord Chancellor observed, that injunction was very much at large.) Then came *Aston v. Aston*, before Lord Hardwicke, who considered the former cases as voluntary, malicious, or intended, or extravagant, or humorous waste. *Obrien v. Obrien*, is matter of injunction only. *Piers and Piers* is perfectly distinguishable from the present; as is *Castlemain and Craven*. *Aston v. Aston* is not applicable, as the Court went upon the situation of the jointress, and that the trust-term was only to raise so much money by sale of the timber, as was necessary for repairs of the estate; and, from the nature of the settlement, the Court held she should not have the benefit of the term, without making a satisfaction for the injury done to the estate by cutting the timber. Lord *Cardigan v. Duke of Montague*, was a case of partition, and not the least applicable. From the result of the cases it appears that, where the Court interfered on the ground of ornamental timber, it has been the intention of the tenant for life to destroy the estate, and [*562] to make it no longer a place of equal enjoyment: and the *Court has not considered merely the manner of plantation of the trees.

If parties were always prohibited from cutting avenues, rows of limes, &c. in some counties, such prohibition would prevent the party from cutting any timber. No case has warranted an account. According to the authority of *Lewis Bowles's* case, the property is not in the plaintiff, but in Mrs. Dummer; as tenant for life, she has the legal right to the property, and the Court can only restrain the party abusing that property.

LORD CHANCELLOR. If the Court restrains the cutting, it goes upon the idea that the timber is not conveyed by the grant.

Mr. *Mitford*. Suppose the trees not to be ornamental, the property is Mrs. Dummer's; if they are ornamental, the plaintiff has a right to protect them.

LORD CHANCELLOR. This is not within the idea of waste, but destruction. Lord Coke lays it down that, if trees are not timber, yet, if they afford shelter, it will be waste to cut such trees.

The operation of law preserves timber upon the inheritance, as part of such inheritance; and where it is not an actual spoiling of the estate, it shall not be deemed a destruction, but the property be considered as that of a tenant for life. This is a question as to the extent of the grant; for if, by law, she has a right to cut the timber, it is a gift to her of such timber: but if, according to equitable construction, she has not the grant to cut timber, the consequence of the grant not extending to it, is, that it will remain as if it had not been inserted. That seems to be the point where the difficulty arises, whether this grant extends to trees which are not for profit. As to the case of *Rolt v. Somerville*, it came on upon

demurrer, which was entirely overruled, so that no judgment proceeded upon it.

In the case of *The Bishop of London v. Webb*, there was not a word of an account in the prayer of the bill: the question was not agitated; no inquiry before the Master was asked for. If this case came within the description of tenant for life without impeachment of waste, trees which were cut down cannot be replaced; and though, as trees afford shelter or ornament, they might be valuable in themselves, and therefore the party answerable, *yet, as to what are cut in pleasure- [*563] grounds and gardens, they cannot come within the description of ornament or shelter. (4)

Mr. Morris's description of the power is too general: he says she might cut everything. The codicil must be coupled with the words "of the want of power;" and the fair construction is, that she might cut down timber in a husbandlike manner for her use and benefit; and had no further power. The common law knows of no distinction but under twenty years, or above that period; but the dealers in timber understand four feet solid timber; but it is questionable whether so in all situations, and that a tree of such a description is to be cut down as a timber tree. An estate may be perfectly stripped if there are no other trees left upon it; and, if so, the estate might be left without timber. The most reasonable case is *Castlemain v. Craven*; though different in point of circumstances, it shows what the Court has done in respect to cutting timber, and that it has made a distinction between thriving and unthriving timber; though the word timber is used in such a general way, yet the Court will put such a reasonable construction upon it as the case will bear. The words *husbandlike* and *reasonable*, used in *Aston v. Aston*, though perhaps vague and general in their meaning, yet, according to the judgment of persons skilled in timber, are easily defined.

Here, Mrs. Dummer had no thought of abusing or destroying the property; she meant to occupy it as a person wishing to reside in the place would desire to occupy it.

If it does not appear there has been destruction, it would be premature to refer it to a Master's office; if any inquiry is necessary, it would be proper to send it to a jury, to inquire whether there has been any destruction committed. In *Lord Castlemain v. Craven*, the Court sent it to issues to try, 1st, the value of the thriving, 2d, of the unthriving timber. In the present case the proper issues would be; 1st. Whether Mrs. Dummer has cut down any trees, by which she has deprived the mansion-house of Cranbury or Woolston of any ornament or shelter; 2dly. Whether she has cut down any trees not commonly esteemed timber, and not usually cut down by tenants for life without impeachment of waste, as such.

*Mr. Mansfield, in reply.

[*564]

It is a point of discretion, and difficult to fix a precise rule by which the judgment of the Court is to be governed: but, considering the nature of the case, and the power under which Mrs. Dummer has acted, the direction must be similar to that in *Aston v. Aston*. The consequence of the preventive jurisdiction must be to give an account. Mr. *Mitford* is mistaken as to the ancient law. Till the stat. 2d of Westminster, there was no remedy but the writ of prohibition. An action on the case for

(4) See, however, the order in the principal case, stated from R. L., ante, 1 vol. 168, and the Editor's note, *ibid.* 166.

damages would lie for waste, after the writ served. Westm. 2, gave the account of waste, and in analogy to it this Court has exercised its jurisdiction, by injunction; and, consequently, it gives an account. Under this known power Mrs. Dummer has committed legal waste. Mrs. Dummer has a limited and special power; very unlike that of a tenant for life without impeachment of waste; yet she has cut a great number of trees, some of them extremely small: a number of oaks, 250 of which were valued only at 3s. and 2s. a tree. The testator's object was merely to give her a power of cutting timber for profit, and not extravagantly: not to cut down all the timber, at one season, but successively. As to trees for ornament and shelter, she had no authority to cut them, as this power extended only to trees for profit. As to the issues, no such were ever directed: the former is, whether she has deprived the houses of ornament or shelter; which would be an extraordinary question to be sent to a jury: the real question is, whether the possessor who left them, left them as ornamental. The second issue, whether they were such trees as are usually cut by tenant for life without impeachment of waste, is a question of law and not of fact, fit only for a jury of conveyancers: there must be such a reference as that in *Aston v. Aston*.

Lord CHANCELLOR said, this was a very unusual application. The right is of as loose a form as any known in this Court; every diligence should be applied by the Court, to direct the inquiries in such a way as to give the least possible expense and difficulty to the parties. He therefore directed the cause to stand over till the first day of causes after the term, and desired that, in the mean time, he might be attended with copies of former decrees, and injunctions in cases of waste.

[*565] *The cause accordingly stood over, and no judgment was given till the 24th of May, 1792, when a trial at law was directed upon the following issue, whether the defendant Harriot, now wife of ——— Dance, had cut any timber or other trees which had been placed, or designedly left for the ornament or shelter of the mansion-house, gardens, and pleasure-grounds at Cranbury, and at Woolston; (5) and also, whether the defendant had cut any saplings or young trees down which are not proper to be felled as timber, (5) and what damage had been sustained thereby: and the plaintiff was to be plaintiff at law, and the defendants, Dance and his wife, to be defendants, and the usual directions were given, and the consideration of costs and further directions reserved till after the trial. (a)

(5) See the extract from R. L., of the order originally made in this matter, *antea*, 1 vol. 168, note (3). The Editor has observed, *ibid.* 166, note (1), that it has served as a general precedent for injunctions in similar cases.

(a) See, on the subject of Waste, *Chamberlyne v. Dummer*, 1 Bro. C. C. 166, and notes; *Plymouth v. Archer*, 1 Bro. C. C. 159, and notes; *Lee v. Alston*, 1 Bro. C. C. 194, 197, and notes; *Newdigate v. Newdigate*, 2 Clark & Fin. 601; *Kinsler v. Clarke*, 2 Hill, Ch. 618.

[It was observed by Lord Hardwicke, in the case of *Aston v. Aston*, 1 Ves. 266, that at common law, the clause without impeachment of waste only exempted tenant for life from the penalty of the statute, the recovery of treble value, and the place wasted: and his Lordship considered *Lewis Bowles's* case, 11 Co. 79, as having first determined that these words also gave the property. This opinion, if correctly reported, must have been founded upon the extra-judicial determinations of Wray, Chief Justice, and Manwood, C. B., cited in *Herkenden's* case, 4 Co. 62, and the case in the Year Books, 27, H. 6. These have, however, since been shown not to be law; and it is clear, from the reasoning in *Lewis Bowles's* case, and the numerous authorities there cited, that the "constant opinion in all ages," was, that these words gave power to the lessee to do waste, which produced an interest in him if he executed his power during the privy of his estate; that at the time of the statute of *Marlbridge*, the clause was in use, and Lord Coke clearly proves, from the words of that statute, that the effect of it was not only to allow the lessee to commit waste, but also to dispose of the timber to his own use.

The necessary consequence of this determination was, that tenant for life without impeachment of waste was not to be restrained in equity, for that would have been to determine that he should not enjoy that property which the law allowed him. *Tracey v. Tracey*, 1 Vern. 23; 1 Eq. Ab. 399. It was soon however found, that an unreasonable use might be made of this very extensive power, and therefore courts of equity, where they discovered that tenant for life was making an unconscientious use of this power, assumed the jurisdiction of restraining and modelling it.

The case often referred to as having established this doctrine, is that, which is so well known by the name of Lord Barnard's case, before Lord Cowper: this however is erroneous, as it was a common head of equitable jurisdiction, even in Lord Nottingham's time. Thus, in the case of Abraham (should be Abrahall) v. Bulb (in Freeman. 53, S. C. Show. 69, 1 Eq. Ab. 757), we find his Lordship treating it as a settled point, that if tenant for life does waste maliciously, this Court will restrain him, though he has express power to commit waste; and that he never knew an injunction in this respect denied, unless it were to Serjeant Peck, in Lord Oxford's case, and he believed he should never see this Court deny it again. His Lordship cited the Bishop of Winchester's case, and Lady Evelyn's case, as instances in which such injunctions had been granted. In other cases about the same period, the Court declared that it would restrain both tenant for life without impeachment, and tenant after possibility of issue extinct, from "wilful," "destructive," "malicious," "extravagant," or "humorous," waste. *Williams v. Day*, 2 Ch. Ca. 32; *Cooke v. Whaley*, 1 Eq. Ab. 400; *Anon. Freeman*. 278.

The doctrine thus established, led the way for the celebrated determination in Lord Barnard's case, which certainly was one that strongly demanded the interposition of a court of equity. The defendant having, in consequence of some displeasure against his son, got two hundred workmen together, and in a few days stripped Raby castle of the lead, iron, glass-doors, and boards, to the value of 3000*l*. The case is reported in several books, *Gilb. Eq. Rep.* 127; 1 Eq. Ab. 399; *Prec. Chan.* 454; 1 *Salk.* 161; 2 *Vern.* 738. Upon this authority, also, Lord Hardwicke, 1 *Ves.* 265, declared, that if tenant for life, without impeachment of waste, were to pull down farm-houses, or grub up a wood, he should not scruple to restrain him.

The foundation of this doctrine was the destruction which would otherwise come to the inheritance. The extension of it to trees planted for ornament, &c., had not yet obtained; it frequently happened, therefore, that where the relief prayed was not grounded on destruction, this interference was refused. Accordingly, in the Anonymous case in Freeman, cit. sup., the defendant, though restrained from cutting down trees near the house, and fruit trees growing in the garden, was not prevented from cutting down some turrets of trees which grew a land's length from the house, under the idea of ornament: and in *Piers v. Piers*, 1 *Ves.* 521, where a bill was brought by a son against a father (tenant for life without impeachment), Lord Hardwicke declared, that if a son should have it in his power to call his father into a court of equity, for any alterations he makes in a walk or an avenue, it would be such a fund for disputes between father and son, that it would have been better for the public that Raby castle had been pulled down, than that the precedent had been made.

It was, however, about this time, that the Court began to enjoin, where tenant for life, without impeachment, was taking down trees of too young a growth, and unfit for timber; and though Lord Hardwicke, in *Aston v. Aston*, hints that he thought this was going too far, yet there were several precedents for it at that time. *Lord Castlemain v. Lord Craven*, 22 *Vin. Ab.* 523; 2 *Eq. Ab.* 758; *Leighton v. Leighton*, *Obrien v. Obrien*, cit. 6 *Ves.* 111.

The next step was to restrain the cutting down of trees, planted for ornament. *Charlton v. Charlton*, cit. 3 *Atk.* 215, where Lord King continued an injunction as to trees standing for ornament, though he dissolved it as to straggling trees. *Packington v. Layton* (3 *Atk.* 215, nom. *Packington's case*), where Lord Hardwicke granted an injunction to trees in lines and avenues on rides in a park, on the ground of their being for ornament. *Leighton v. Leighton*, and *Obrien v. Obrien*, cit. sup., are also precedents to this effect.

In late times, the same principle has been acted upon and extended, from ornament of the house, to out-houses and grounds, then to plantations, vistas, avenues, to all the rides about an estate for many miles round; and in a late case it was extended to trees planted for the purpose of excluding objects from the view. *Day v. Merry*, 16 *Ves.* 375. Upon the same principle it has been extended to a common, where clumps of trees were planted for the benefit of view, and as (if *de facto* planted for ornament) the remoteness or contiguity could not alter the principle, it was applied, though the common was some miles from the house, and though land belonging to other persons intervened. *Marquess of Downshire v. Lady Sandys*, 6 *Ves.* 106; *Jebb v. Jebb*, *Johns v. Johns*, cit. ib.; *Lord Tamworth v. Earl Ferrers*, ib. 419; *Williams v. Macnamara*, 8 *Ves.* 70. The orders on these occasions are always drawn up in the terms used in the present case. *Lady Strathmore v. Bowes*, ante, vol. ii. 88.

The inconveniences attending this doctrine are very great: Lord Eldon has said, that he could not admit that it was wiser to extend than to confine it. On the contrary, if it were to be considered as *res integra*, the best course would be to require executors and testators to say what their own injunctions should be, rather than leave them at liberty to give legal rights, this Court being called on to determine how the parties having those legal rights may be said to execute them equitably. *Burges v. Lamb*, 16 *Ves.* 185. The Court has not gone further than protecting what has been planted and is now growing for ornament, and has repeatedly refused to act upon affidavits stating that the timber is ornamental. ib.

The principle seems to be, that if the grantor or testator has gratified his own taste by planting for ornament, though he has adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and upon the competition between those

parties, the Court should see that the tenant for life was right in point of taste, and the tenant in tail wrong, yet the taste of testator, like his will, binds them; and it is not competent to them to substitute another species of ornament, for that which the testator designed. The question, which is the most fit method of clothing an estate with timber, for the purpose of ornament, cannot be safely trusted to the Court, 6 Ves. 110. — *Eden.*]

ELLIS and Wife v. ATKINSON and Another.

In Court, Easter and Trinity, 1789. 24th May, 1792.

(Reg. Lib. 1791. A. fol. 711. b.)

Husband and wife agree that the property settled to her separate use, [and also her contingent reversionary interest in the event of her surviving him,] (1) shall be paid to the husband; the agreement carried into execution by decree of this Court. (1)

PLAINTIFF, Thomas, the husband, being entitled to a sum of 4000*l.* secured on mortgage, and it being intended previous to the marriage, between plaintiffs, to settle 2000*l.*, the moiety of the said sum, and interest thereof, upon plaintiff, Susannah, for her sole and separate use, and to be at her disposal, notwithstanding her coverture, by indenture of lease and release, dated 7th and 8th of February, 1787, Thomas assigned to the defendants, their executors, &c., the said principal sum, and the interest thereof, and the security for the same, in trust, after the solemnization of said marriage, as to 2000*l.* one moiety thereof, and the interest attending the same, for plaintiff, Thomas, his executors, &c., and as to the other moiety "in trust that they, during the joint lives of plaintiffs, pay the interest of said last 2000*l.* to plaintiff, Susannah's, proper hands, or to such person or persons, and for such purpose as plaintiff, Susannah, notwithstanding her coverture, by any writing or writings under her hand, should from time to time direct and appoint, to the intent that the same might be for her sole, separate, and peculiar use and benefit, and might not be subject to the debts, control, disposition, or engagements of plaintiff, Thomas; for which purpose the receipt of plaintiff, Susannah, or of such person or persons as she should direct or appoint to receive such interest, should alone be a sufficient discharge for the same, to the said de- [*566] fendants; *and in case Susannah should happen to survive the plaintiff, Thomas, then the said last-mentioned sum of 2000*l.* should, immediately after his decease, be in trust for said Susannah, her executors, &c.: (2) but, in case said Susannah should happen to die in his lifetime, (3) then the same should, from and immediately after her

(1) This decision seems clearly wrong, in so far as related to the wife's contingent interest in the event of her surviving the husband: though her power was absolute as to the interest of the fund; and also as to the principal of it, as with reference to her death in his lifetime: agreeably to *Hulme v. Tenant*, ante, 1 vol. 16; *Gorges v. Fettiplace*, and *Pybus v. Smith*, ante, 8 & 340. Quia vide the notes passim. Sir Lloyd Kenyon's decision in the case of *Mrs. John Buller*, cited in the principal case, p. 567, and which seems to have had great effect upon it, has been held decidedly erroneous. It is the case called *Mac Carmick v. Buller*, in 1 Cox, Ch. Ca. 357, and is much observed upon and disapproved by Lord Eldon, C. 8 Ves. 174, et seq. See also 10 Ves. 583, 584, et seq.; and in particular the Editor's notes to *Fraser v. Baillie*, ante, 1 vol. 518, 519; and *Mr. Roper's* 1 vol. Bar. & Feme, p. 243, et seq., more especially 251, 252.

(2) The decision seems quite erroneous as to this contingent interest. Vide note (1).

(3) The appointment would have been good to this extent; but it seems the Court went to a greater extent than the parties themselves had contemplated. The appointment seems to have specifically executed the power she had to dispose, in the event of her death in the lifetime of her husband. Whereas the decree, by directing a transfer of the funds, stripped the wife of her reversionary interest in the event of survivorship, which she had not specifically passed, and could not have effected, if she had attempted it.

decease, be upon such trusts, and for such purposes, and in such manner and form, either absolutely or conditionally, as she, notwithstanding her coverture, by any deed or deeds, writing or writings, by her signed, sealed, and delivered in the presence of two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of her last will by her signed, in the presence of a like or greater number of such witnesses as aforesaid, should direct or appoint: and in default of such direction or appointment, or until such direction or appointment having been so made should take effect, and when the trusts or interests thereby directed or appointed should respectively end or determine; and as to such part of the said sum of 2000*l.*, whereof no such direction or appointment should be made, in trust for the executors or administrators of said Susannah, as part of her personal estate." The marriage afterwards took effect, and the interest accruing on the 2000*l.* was paid to Susannah, up to the 8th of August preceding the filing of the bill; but the husband and wife having agreed that she should give up to the husband all her interest in the 2000*l.* she by deed-poll 1st December 1788, reciting the power, "directed and appointed that plaintiff, Thomas, or his assigns, should, thenceforth, during the joint lives of said plaintiffs, receive the interest of said 2000*l.*, for his sole use, and that in case she should die in the lifetime of the said Thomas, the sum of 2000*l.* should immediately after her decease, be in trust for the plaintiff, Thomas, his executors, administrators, and assigns; (4) and she (so far as she was, in law or equity, capable of so doing) assigned the said sum, to hold the same unto said plaintiff, Thomas," &c., and that they applied to the trustees to assign the same to plaintiff, Thomas, and the trustees refusing to do so, without the direction of this Court, they filed their bill for that purpose.

The cause came on among the short causes, the last day but one of Easter term, 1789, when the wife attended in Court to consent that the sum of 2000*l.* might be assigned, and the securities, &c., for the mortgage-money delivered up to the plaintiff, Thomas.

*Lord CHANCELLOR, then, doubted much whether he could [*567] take the wife's consent, but took it as far as it might be available; at the same time desiring its effect might be considered.

It came on again in Trinity term.

Mr. *Solicitor-General*. When this question was on before, your Lordship's doubt was not as to the principal sum, but whether she could give the interest irrevocably to the husband; the interest being to be paid to such person or persons as she from time to time should appoint. A *feme covert* having a separate property is, as to that, a *feme sole*, *Peacock v. Monk*, 2 Vesey, 190; and if she borrows money and gives a bond, that will be the foundation of a demand out of her separate property, *ibid.* p. 192. So in *Norton v. Turvill*, 2 P. Wms. 144, the woman's separate estate was held to be liable to her bond. In *Grigby v. Cox*, 1 Vesey, 517, it is held that, as to anything settled to her sole use, she is to be considered as a *feme sole*. In *Thayer v. Gould*, cited at the end of that case, money to be laid out in land to be settled to a husband for life, then to wife for life, was paid to him. In *Hulme v. Tenant* (ante, vol. i. p. 16), the wife, joining in a bond with the husband, made her separate property liable. In *Biscoe v. Kennedy* (cited in the note there), the wife's property so settled was considered as the property of a *feme sole*, and liable to her debt before the marriage. In *Allen v. Papworth*, 1 Ves. 163, (5) it was

(4) See the preceding note.

(5) Stated fully from Reg. Lib. in the Editor's Supplement to Vesey, senior, 88, et seq.

held that the wife joining with the husband in bringing the bill that her property may be applied to payment of her debts, is a sufficient appointment. Here, the money being to be paid to the use of the wife during the joint lives, a fine would have barred a similar interest in lands: and if a fine would have barred at law, her examination here is equivalent; then if she dies, the husband has, by this appointment, an interest in the fund, and if she survives, she is competent, by her assent in Court, to bind herself. Lord Kenyon did the same thing, upon great consideration, in the case of *Mrs. John Buller*, (6) who was entitled to property for life, with remainder to children; he, with her consent, ordered a part to be raised for the advancement of a child.

Lord CHANCELLOR. The question is, whether, from the peculiarity of this trust, it did not intend the whole to go to her if she survived. [*568] If it was not to be paid according to the instalments, *then, whether the wife can dispose of her eventual interest, or of the produce, in the mean time. The case before Lord Kenyon was a case of general property.

Mr. *Hollist* mentioned a case, 3 Atk. 71, *Pearson v. Brereton*, where money given to persons, in trust for the wife, to be laid out in land, was ordered, by her consent, to be paid to the husband.

This cause stood over, and came on again, when Mr. *Solicitor-General*, added to the cases he had before cited, that of *Clarke v. Pistor*, Rolls, 25th March, 1778 [cited ante, 346, note], where, by settlement 8th February, 1776, 2000*l.* bank stock was covenanted to be, and was transferred to trustees, in trust, to pay the interest and dividends to such persons, in such proportions, and for such purposes, and in such manner and form as plaintiff, Margaret, should from time to time, during her life, notwithstanding her coverture, by any note or writing under hand, direct or appoint; and in default of such direction or appointment, into the proper hands of plaintiff, Margaret, for her separate use, &c.: and after the death of plaintiff, Margaret, to transfer the bank stock unto plaintiff, her husband, if then living, if not, to his executors, &c., as part of his own personal estate. On bill filed by the husband and wife against the trustees, without making any appointment, the Court, with consent of the wife in Court, decreed the transfer.

Mr. *Hollist* also added the case of *Nieman v. Cartony*, 24th April, 1771 [cited antea, 346, note], a legacy given to the wife for her sole use with a power of appointment by will, and in default of appointment, to her executors; ordered, upon her consent, to be paid to the husband.

The cause again stood over, and was said to be compromised; but, on the 24th of May, 1792, Lord Chancellor made his decree, that the defendants should assign the sum of 2000*l.*, the moiety of the 4000*l.*, secured by mortgage on the premises in question, and appointed by the indentures of settlement of the 7th and 8th days of February, 1787, for the sole and separate use of the plaintiff, Susannah, and such interest as the Master shall find to be due, in respect of such 2000*l.*, to the plaintiff, by virtue of and under the deed-poll and appointment dated 1st December, 1788, (7) and that the defendants should reconvey the mortgaged [*569] premises, free *and clear of all incumbrances, to the plaintiff,

(6) *Mac Carmick v. Buller*, 1 Cox, Ch. Ca. 357; but that case is not law. See per Lord Eldon C. 8 Ves. 174, et seq.; et vide 10 Ves. 583, 584, &c., et note (1), antea.

(7) This was going beyond the specific appointment of the parties. See the appointment, antea, p. 564, and note (3) thereupon.

Thomas Ellis, or to whom he shall appoint, and that the plaintiff should pay unto the defendants the costs of this suit. (a)

(a) See Sugden on Powers (4th Lond. edit.) 115, et seq.; Hulme v. Tenant, 1 Bro. C. C. 16, and notes to that case; Pybus v. Smith, ante, 340, 345, notes; Fettiplace v. Gorges, ante, 8, 10, notes and cases cited; 2 Story, Eq. Jur. ch. 37, § 1394, and the discussion in the notes; Sockett v. Wray, 4 Bro. C. C. 483.

WOODCOCK v. The Duke of Dorset. [On a rehearing.]

In Court, Mich. 1789. Lincoln's-Inn-Hall, 9th May, 1790. 24th May, 1792.

(Reg. Lib. 1791. B. fol. 118. b.)

[In this case, a portion proceeding from a parent held vested in a deceased child, upon what was collected by the Court as the intention of the parties, against very strong expressions to the contrary.] (1)

THIS bill was filed by the plaintiff as administrator of the late Countess of Thanet, and stated that, by settlement, dated 5th July, 1744, made between the Right Honorable John Earl Gower, of the first part; Lord John Sackville, second son of Lionel Duke of Dorset, and the Honorable Lady Frances Sackville, his wife, one of the daughters of the said John Earl Gower, of the second part; and trustees of the third part; reciting, among other things, the provisions made by the marriage settlement of the said Earl Gower with Lady Evelyn, his first wife, and that Mrs. Gertrude Tolhurst, by her will, gave all her real and personal estate (subject to a legacy of 1000*l.* to the said Lady Frances), to Earl Gower, and that the said John Earl Gower had by his former wife two sons and five daughters, and that by deed-poll dated the 6th June, then past, he had appointed 5500*l.* (including the said 100*l.*) for the provision of the said Lady Frances, and also reciting that Lord John Sackville was desirous to make a provision for himself and Lady Frances his wife, and the issue of their bodies; and to that end proposed, that the said Earl Gower should pay to him 500*l.*, part of the said 5500*l.*, and should retain the remaining 5000*l.* in consideration

(1) This seems to be the strongest decision upon the subject, in opposition to words so "*difficult to manage*," as were here used; and Lord Eldon C. has repeatedly stated that it can only be maintained upon [the certainty that the Court attained] the clear intention of the parties. See in *Hope v. Lord Clifden*, 6 Ves. 508, 509, in *Powis v. Burdett*, 9 Ves. 426, 437, &c. See also per Sir W. Grant, M. R. in *Howgrave v. Cartier*, 3 Ves. & Beames, 85, 86, 87, note (4), *postea*. The courts certainly have long inclined, and do certainly lean strongly in favor, of the vesting of portions, as between parent and child; and the general rule now existing is, that such portions are to be considered as meant to be vested at twenty-one, or marriage, unless there be something in the instrument utterly incompatible with such a construction. The Editor has already cited the words of Eldon C. to that effect (from the case of *Codrington v. Lord Foley*, 6 Ves. 378, &c.), in the note to *Conway v. Conway*, ante, 267; and cannot, perhaps, conclude here more acceptably, with reference to the precise point, than by an extract of Sir W. Grant, M. R.'s, deduction of the principle; thus, in *Howgrave v. Cartier*, 3 Ves. & Beam. 85, 86.

"The sort of question that arises in this case has so frequently occurred of late, that there is no great difficulty in collecting the law upon it. If the settlement clearly and unequivocally makes the right of the child to a provision depend upon its surviving both or either of the parents, a court of equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the Court leans strongly towards the construction which gives a vested interest to the child, when that child stands in need of a provision; usually, as to sons, at the age of twenty-one; and as to daughters, at that age or marriage."

of his making an immediate provision for him and his family: it was witnessed, (2) that the trustees should, out of the rents and profits of the estate thereby conveyed to them [or by sale of mortgage, &c.], raise and pay the yearly sum of 200*l.* to the said Lord John and Lady Frances, during their natural lives [and the life of the longest liver of them], and on the further trust, that if the said Lord John and Lady Frances should leave, (1) at the death of the survivor [of them] any child or children of their two bodies begotten, to raise [and pay] the yearly sum of 200*l.* for the maintenance of such child or children [in such manner as the said trustees should think fit] until [such child or children] should attain the age of twenty-one years, then to raise the sum of 5000*l.* and pay the same to such (3) child or children, in equal shares, upon their attaining their respective ages of twenty-one years, and if there should but one [such (4)] child, then to such child.

[*570] *Lord John and Lady Frances had issue two children, the defendant the Duke of Dorset, and the late Lady Thanet, who died in the year 1778, having attained her age of twenty-one years, in the lifetime of her mother the said Lady Frances, and having survived her father Lord John, but died in the lifetime of the said Lady Frances.

And the question was, whether Lady Thanet, dying in the lifetime of her mother, was entitled to a share of the 5000*l.* with the defendant, the Duke, or, he having survived his father and mother, was entitled to the whole of that sum.

Mr. *Solicitor-General*, and Mr. *Campbell*, for the plaintiff, contended that Lady Thanet was entitled to a moiety, notwithstanding her having died in the lifetime of her mother; that the meaning of the settlement

(1) See note (1) preceding page.

(2) The terms of the settlement are stated from Reg. Lib. in the note to 3 Ves. & Beam. 82.

(3) The word *here* as in Reg. Lib. is "*the*" and not "*such*." Sir W. Grant, M. R., observes upon this, that the case thus modified is not so strong a one as it appears from Mr. Brown's report of it: since the omission of the word "*such*" left an opening for letting in all the children." His Honor, however, puts this only as an argument; observing, in opposition to it, that the children in this second clause must be considered as "the same children" as were spoken of in the first; and, in addition to this, the Editor suggests, that the word "*such*" actually occurring again in R. L. within two lines, though omitted in the report, totally obviates the argument, and renders the report correct in substance.

(4) Lord Eldon C. speaking of this decision, 6 Ves. 508, 509, says:—

"The words 'if there should be but one child,' upon the natural construction, must mean one child left at the death of the survivor. It would be impossible to raise an ambiguity upon that, in any other case than that of parent and child. In any other case, the answer would be, that the Court had no right to say otherwise; for the money would have been in the hands of Lord Gower; and no trust upon it. But Lord Thurlow went this length, that in case of parent and child, a child having attained the age of twenty-one, and having occasion for a portion, though dying in the lives of the parents, is a child living at the death of the survivor. He certainly goes that length upon the intention; observing that the words were very strong and difficult to manage."

And again, in 9 Ves. 436, his Lordship says:—

"In *Woodcock v. The Duke of Dorset*, the construction comprehending children who died was very difficult, for there was not only the condition of leaving children, but it was expressed to be for maintenance of '*such* child or children,' and to pay to '*such* child or children,' not any children. The contract was, not only between the authors of the settlement, but between those who were to take under the settlement; and the brother had a right to say, that, if the words were to be considered in their natural and obvious meaning, he had nothing to do with the question between the authors of the settlement and the representatives of the other child; but, being a contract for, as well as against him, he was entitled to the whole. But Lord Thurlow thought upon the whole that was not the meaning, and that upon the intention, those words were not sufficient to confine it to the surviving child. No comment from Lord Thurlow himself can support that decision upon any other ground. In *Hope v. Lord Clifden*, I followed that decision, and others, though upon different words turning upon the same principle, in giving a large construction to words for the benefit of the children to be provided for. I do not deny that it appeared to me, there had been in these cases a considerable strain upon language."

was, to provide for the issue of the marriage, not to give anything to Lord Gower; if the literal construction was the true one, and both the children had died in the lifetime of the mother, Lord Gower would have kept the money, which was part of it the property of Lady Frances, and not have been bound to pay it to any body.

Mr. *Mansfield*, and Mr. *Partington*, for the defendant, the Duke of Dorset.

By the terms of the deed, unless Lord John and Lady Frances left issue, the payment of the 5000*l.* could never arise; and there is no doubt that parents may make such a provision; having therefore made it, it cannot be varied. *Wingrave v. Palgrave*, 1 Wms. 401.

LORD CHANCELLOR. It is impossible to say that parents may not make a provision for children which depends upon their surviving them, but this is a different case; here the contingency would be in favor of Lord Gower. So that the construction would be, that the Lady being entitled to 5000*l.* it was to be given to Lord Gower, subject to the contingency of her and her husband having children who should survive them. It is impossible it could be intended that Lord Gower should take in the event that a young woman of twenty should survive her children. There *is [*571] no word used to exclude Lady Thanet but the word *such*, upon which it might have been contended, that the property should not vest unless the children were infants at the decease of the survivor. Though the words are strong and difficult to manage, the intention (4) of the settlement is the truth and honor of the (4) case. (a)

On the 24th May, 1792, LORD CHANCELLOR decreed for the plaintiff according to the prayer of his bill.

(4) See note (4) preceding page.

(a) If a settlement "clearly and unequivocally makes the right of the child to a provision depend upon its surviving both, or either of its parents, a court of equity has no authority to control that disposition," per Sir W. Grant, 3 Ves. & Bea. 85; *Wingrave v. Palgrave*, 1 P. W. 401; *Hotchkin v. Humphrey*, 2 Mad. Rep. 65. But the Court, considering it as a hard thing to impute to a father, that he should mean, that where a child has attained twenty-one, or come to marriageable years, and formed a family; yet because that child dies in his life, its descendants should be left destitute; and feeling that not to be a probable intention in the parent, has frequently "struggled with language," and put a construction upon words, which they would not bear in the case of a stranger, upon a matter of contract, without any mixture of parental feeling. Accordingly, in the present and many other cases, the Court has leant strongly towards that construction which gives a vested interest to a child, when that child stands in need of a provision, *Emperor v. Rolfe*, 1 Ves. 208; *Cholmondeley v. Meyerick*, 1 Eden, 77; *Rooke v. Rooke*, 2 Eden, 8; *Reynous v. Jeffreys*, ib. 365, and upon appeal 6 Bro. P. C. ed. Toml. 398; *Randall v. Metcalf*, 3 Bro. P. C. ed. Toml. 318; *Willis v. Willis*, 3 Ves. 51; *Hope v. Lord Clifden*, 6 Ves. 499; *Schenck v. Leigh*, 9 Ves. 300; *Powis v. Burdett*, ib. 428; *King v. Hake*, ib. 438; *Bayard v. Smith*, 14 Ves. 470; *Howgrave v. Cartier*, 3 Ves. & Bea. 79; S. C. Coop. Rep. 66. — *Eden*.

HIBBERT and Others v. ROLLESTON and Others, Assignees of
MARGETSON, a Bankrupt.

Lincoln's-Inn-Hall, 9th Dec. 1790. 24th May, 1792.

(Reg. Lib. 1791. A. fol. 308.)

A bill of sale of a ship was made as a collateral security, and the papers, &c. delivered, but there was no recital in the bill of sale, of the registry (pursuant to act 26 Geo. 3, c. 60). This cannot be supplied against assignees of a bankrupt: and bill for that purpose dismissed. (1) (a)

MARGETSON, the bankrupt, being possessed of two bills of exchange drawn by him, on, and accepted by, Messrs. Dowson & Atkinson, applied

(1) It has been long quite settled, that if the requisites in the Navigation of Ship Registry Acts have not been complied with, the assertion of any equitable right or title to the vessel will be utterly unavailing. The policy of those statutes throughout, was, to render all contracts or assignments "void, to all intents and purposes," if the terms thereby prescribed were omitted; but as the principal case occasioned some doubts as to the law being sufficiently explicit on this head, they were removed about two years afterwards by a clause in the 34 Geo. 3, ch. 63, s. 14; vide 6 Ves. 742, &c.; 3 Merivale, 332, 333. In confirmation of the doctrine as above stated, with various observations interspersed upon the principal case, see *Curtis v. Perry*, 6 Ves. 739, et seq.; *Mestaer v. Gillespie*, 11 Ves. 621, et seq., more especially 625, 626, 638, 643, 644, and *Dixon v. Ewart*, 3 Meriv. 322, et seq.; which comprehends various other authorities, and evidences the rule to be as follows: that a bill of sale of a ship at sea passes the absolute property, subject to be devested, in the event of the requisites prescribed by the acts not being complied with after the vessel's return. < See post, 576, note (a). > See further, in particular, *Thomson v. Leake*, 1 Madd. Rep. 39, 395, et seq. with the MS. cases cited *ibid.* 399, 400, showing that the Court will not interfere in such instances, even where the other parties have been guilty of fraud; which point did not seem quite settled in the prior case of *Mestaer v. Gillespie*, 11 Ves. 639, 640. < See the cases cited in note (a), to 3 Kent (5th edit.) 147, with the reference to the late English statutes upon this subject. Respecting the custom-house documents, see *ib.* p. 139, et seq. >

(a) In *Weston v. Penniman*, 1 Mason. 317, it is said to be very true, that a bill of sale is necessary to transfer the title of a ship, "but this does not depend upon any enactment peculiar to the municipal law [of the United States], but grows out of the general maritime law, which requires such a document as the proper muniment of the title of the ship. The *Sisters*, 5 Rob. 138. To entitle ships to be registered, and to be deemed ships of the United States, with the privileges and exemptions of such ships, it is necessary, that the transfer should be made according to the form prescribed in the registry acts; that is to say, that it should be by some instrument in writing, which shall recite at length the certificate of registry; but the acts do not declare any other transfer void and illegal, but simply deny to ships transferred in any other manner the privileges of ships of the United States, and deem them alien or foreign ships. In this respect the acts [of the United States] differ from the English registry acts, which declare, that all transfers, or agreements for transfers, made without reciting the certificate of registry at length in the bill or instrument of sale or agreement for transfer, shall be utterly void to all intents and purposes whatsoever." Again, in *La Jeune Eugenie*, 2 Mason, 435, it is said, that "it is well known, that a bill of sale is the universal instrument, to which courts of admiralty look to establish the legal interest in ships. See *The Donna Marianna*, 1 Dodson, 91, 92; *Abbott on Shipping*, by *Shee*, 1; *Ohl. v. Eagle Ins. Co.* 4 Mason. 390.

In the Prize Court, the ownership of a vessel must be decided by the bill of sale. The *San Jose Indiano*, 2 Gallison, 234. See the *Welvaart*, 1 Rob. 122. See further, on the subject of the necessity of a bill of sale in the transfer of the title to ships, *Abbott on Shipping* (by *Story*, 1829), p. 1, and note (1), and the cases there cited, with the remarks of the learned Editor thereon; *Ex parte Halket*, 19 Ves. 474; 3 Kent (5th edit.), 130, 131.

But in a late case, in Massachusetts, it has been directly held, that at common law no bill of sale is necessary to transfer the property in a ship. *Bixby v. Franklin Ins. Co.* 8 Pick. 86. In that case, the Court say, "We do not find, that a bill of sale or other instrument in writing or under seal, is essential to the transfer of a ship, more than of any other chattel. Such a document may be required in the admiralty courts; but we are not aware that the principle has been introduced into the common law. The cases of *Lamb v. Durant* [12 Mass. 54], and *Taggard v. Loring* [16 Mass. 336], in our own reports, establish a contrary doctrine. We think a bargain, a consideration paid, and a delivery, will pass the property from one to another, in a ship or other vessel. Inconveniences may arise in foreign countries, and in the custom-house, from the want of a bill of sale; but the transfer is good between the parties." See also *Windover v. Hogeboom*, 7 Johns. 308; *Portland Bank v. Stacey*, 4 Mass. 663; *Wheeler v. Sumner*, 4 Mason, 183; 3 Kent (5th edit.), 130, 131.

to the plaintiffs to discount them, which the plaintiffs did, and paid Margetson the value of the two bills, after deducting the proper discount for the time they had to run, and Margetson indorsed the bills to the plaintiff. Before the bills became payable, Dowson and Atkinson stopped payment, and Margetson gave notice thereof to the plaintiff; and it being usual among merchants negotiating bills in such cases, to take up the bills or give security for the payment of them, Margetson applied to the plaintiffs and requested them to accept of his promissory notes for the sum of 2000*l.* payable at three months, in lieu of the said bills; but plaintiffs objecting to accept the same without further security, and Margetson being at that same time sole owner of a ship called *The Commerce* then upon her home from foreign parts, he, by way of further security for the payment of the 2000*l.*, offered to assign the ship to the plaintiffs, and the plaintiffs agreed to accept such promissory note and assignment of the ship, and to give up the two bills of exchange.

In consequence of the agreement, on 21st June, 1788, the plaintiffs gave up the bills of exchange, and Margetson gave them a promissory note, bearing date the said 21st of June, payable to plaintiffs, or their order, three months after date, and also executed and delivered to the plaintiffs, a deed-poll, or bill of sale, of the same date, whereby he, in consideration of the said sum of *2000*l.* assigned the said ship, then [*572] on a voyage to Jamaica and back, with its mast, &c., to hold to the plaintiffs to their own use, and covenanted that he had full authority to sell the premises, and that the same should remain to plaintiffs, free from all former bargains, sales, and incumbrances; Margetson at the same time deposited with plaintiffs the grand bill of sale, and a policy of insurance which had been effected on the ship on her passage to and from Jamaica, and the plaintiffs signed a memorandum in writing, acknowledging the receipt thereof, and promising to return the same on payment of the promissory notes. The ship being at the time of the sale on a foreign voyage, no actual possession could be given. About the 18th of July, 1788, a commission of bankruptcy issued against Margetson, and the defendants were chosen assignees, and about the 22d of November the ship arriving in England, the plaintiffs took possession by sending a person on board her for that purpose, and the defendants also took possession of her by sending a person on board, and the plaintiffs and defendants both continued to hold such possession till the ship was sold as aftermentioned.

By an act of Parliament, passed in the 26th year of the reign of his present Majesty [ch. 60], entitled † “An act for the further increase and encouragement of shipping and navigation,” it is (among other things) enacted, that when and so often as the property in any ship or vessel belonging to any of His Majesty’s subjects shall be transferred to any other or others of his Majesty’s subjects, in whole or in part, the certificate of the registry of such ship or vessel shall be truly and accurately recited, in words at length, in the bill or other instrument of sale thereof, and that otherwise such bill of sale shall be utterly null and void to all intents and purposes.

In the bill of sale or assignment of the ship *Commerce*, executed by Margetson the bankrupt, to the plaintiffs, there was no recital of the registry of the ship, pursuant to the direction of the clause in the act; but the plaintiffs conceiving that, though the bill of sale was informal, yet as the

† See a full history of this act of Parliament, and its policy, in Mr. Reeves’s “History of the Law of Shipping and Navigation,” c. 6, p. 410, especially from p. 455.

ship and her papers were intended to be pledged by Margetson to them, and that they were entitled to have the sum of 2000*l.* paid to them, or to have a valid bill of sale executed to them, applied to the defendants for that purpose, but the defendants refused, and in Hilary term, 1789, commenced an action of trover in the King's Bench, against the plaintiffs, for the recovery of the value of the ship; and the plaintiffs having pleaded the general issue, the cause was tried by a special jury, at the sittings in London after the said term, when a verdict was found for the plaintiffs (at law) subject to the opinion of the Court upon a case reserved.

The case stood for argument in the course of the following Easter term, when it appearing that both parties were in possession of the ship, the Court did not think fit to proceed to the decision of the question, and the case was altered by rule of Court, by stating that the defendants (at law), on the arrival of the ship, took, and entered into possession of her; and by a subsequent rule of Court, it was ordered that the ship should be sold, and the money arising from the sale, to be laid out in the names of Rolleston, one of the plaintiffs in the said cause, and plaintiff Hibbert, and the same is now standing in their names.

The case was afterwards, in Trinity and Michaelmas terms, 1789, argued in the Court of King's Bench,† when the Court gave judgment for the plaintiffs, considering the bill of sale null and void, by reason of the said act of Parliament.

The present bill was filed in Hilary term, 1790, by the plaintiffs, who had been defendants at law, insisting that, although they could not make a good defence at law, by reason of the act of Parliament, they had in equity a good right to hold the ship as a security for the money made payable by the promissory note; and that Margetson, if he had not become a bankrupt, would in equity have been bound to have made a valid assignment of the ship to them, or to have paid the money, and that the defendants, as his assignees, were bound to do what the bankrupt must have done. The bill therefore prayed that Rolleston might be decreed to join with the plaintiff Hibbert, in the transfer of the money produced by the sale of the ship to the plaintiffs, &c.

The cause was heard on the 9th of December, 1790, when [*574] *Mr. Mitford, Mr. Graham, and Mr. Steele, argued for the plaintiffs.

It is admitted, by the answer, that it was agreed between the parties that this ship would be a security. It did not rest in agreement, for the instruments were deposited on the making of the bill of sale. The act of Parliament of the 26 Geo. 3, if anything, must vary this from the common case of an engagement to mortgage, which must be carried into execution. There are many cases where this Court executes agreements, although the instrument made use of is invalid; and where the instrument is not good as a legal mortgage, yet it shall be good as an equitable lien.

In the case of *Burgh v. Francis*, cited 1 Wms. 279, there was a defective mortgage in fee for 500*l.*, being by feoffment without livery; the estate was held in equity to be specifically bound by the mortgage.

So in *Taylor v. Wheeler*, 2 Vern. 564 [S. C. cited 2 Vern. 610], a mortgage was made of a copyhold estate which was not surrendered in time, it was decreed that the mortgage, though void at law, was an equitable

† See 3 Term Reports, 406, and Reeves, *z. s.* 490, for the arguments used at the bar, and by the Court at large.

lien on the copyhold estate, and was aided against the assignees of a bankrupt.

In *Dale v. Smithwick*, 2 Vern. 150. It was a warrant of attorney to confess judgment in ejectment. The security was defective, but held a good agreement in equity.

Upon the principle that the assignees stand in the same situation as the bankrupt himself, the plaintiff would be entitled to the decree of this Court for a perfect conveyance of the ship, if it remained in specie, and also we are entitled to an account of the produce of the ship, it having been sold under the rule of the Court of King's Bench.

The bill of sale was intended to convey the property. If it had been barely deposited, that would have been sufficient. *Russel v. Russel* (ante, vol. i. p. 269). The effect of the act done must be according to the contract of the parties.

*Here the parties had it in their power to do the act effectually, [*575] but did it improperly; but it was done for a valuable consideration, and there was no *mala fides* in the transaction; therefore it comes within the common rule of a court of equity.

It may be argued, that here is a reason for a court of equity not interfering, arising from the policy of the statute which declares the bill of sale to be void.

But in the statutes of Elizabeth, restraining leases of ecclesiastical persons, leases, other than such as the statute allows, are decreed to be void to all intents and purposes; yet it is held, that those words shall not extend beyond the particular object of the act, viz. the disherison of successors; for it is said, 3 Bacon Abr. tit. Leases, that that act will not enable a bishop to defeat his own act.

We admit that the Court of King's Bench did right in an action of trover, for they must have determined that the property was transferred; but a court of equity acts in *personam*, and supplies defects by directing the legal transfer.

Where contracts are entered into, as bargain and sale without enrollment, the Court will effect the contract.

When the objects of the act are considered, there will appear to be no objection arise against our demand.

If a ship was taken in execution and sold, if this act is to be construed with such strictness as the Court of King's Bench supposed, it would much embarrass the transfer of this sort of property. If a ship was taken in execution, and sold by the sheriff, the purchaser must come here for the execution of a proper bill of sale.

In *Robinson v. Bland*, Burr. 1077, the Court held, that a note given for money lost at play could not be recovered as such, but that the money might, as the security only was void.

The sole question is, as to the construction of this act, in this Court. The rule here is, that, if the instrument is fair, and cannot operate one way, but can another, it shall be taken as it can *operate. [*576] Thus a feoffment may be considered as a covenant to stand seised; a lease and release conveying a term of years, held to operate as a proper conveyance. The deposit of the muniments here amounted to a contract to do sufficient acts. We have a lien upon the documents, and are entitled to the same relief as if there had been no recovery in the action of trover.

Mr. Solicitor-General, Mr. Mansfield, and Mr. Cox, for the defendants.

The argument from the statute of Elizabeth is an argument at law.

The conveyance, in the present case, must be taken as a void conveyance.

Granting that where there is an intent to make a good conveyance, a court of equity will compel a party who is competent to do so, yet it cannot where an act of Parliament stands in the way.

This case is more like the cases in the annuity acts than those put by the counsel for the plaintiffs.

Where there is a void grant of an annuity, it never has been thought that there was any remedy in this Court; though, if the whole transaction was undone, the party might recover back the money. *Shove v. Webb*, 1 Term Rep. 732.

Mr. Mitford, in reply.

Here the contract is established independent of the bill of sale: the case of *Taylor v. Wheeler* decides, that the imperfect execution of the contract will not invalidate the equity arising from an agreement.

Lord CHANCELLOR (at the hearing) expressed great doubts as to the construction of the act, (2) and ordered the cause to stand over; and, on the 24th of May, 1792, ordered the bill to stand

Dismissed without costs. (3) (a)

(2) A clause was introduced soon afterwards, into the act 34 Geo. 5, c. 68 (s. 14), to obviate these doubts. See note (1), *ante*, with the references.

(3) Lord Redesdale's notes state, that Lord Thurlow decided this case by analogy to the decisions on the Annuity Act; that the statute having made the bill of sale "void to all intents and purposes," the Court must not only reject the admission of such instrument as evidence of the contract, but consider the policy of the law as obligatory to an entire avoidance of the transaction. See to the same effect per Lord Eldon C. 6 Ves. 745, *et ubi supra* in note (1).

(a) The law is well settled, that the delivery of a deed of transfer of a ship, at sea, passes the title to the vendee, subject only to be defeated by his negligence in not taking possession of her within a reasonable time after her return to port. *Brinley v. Spring*, 7 Greenl. 241; *Joy v. Sears*, 9 Pick. 4; *Gardner v. Howland*, 2 Pick. 602; *Tucker v. Buffinton*, 15 Mass. 477; *Badlam v. Tucker*, 1 Pick. 389; *Turner v. Coolidge*, 2 Metcalf, 350; *Putnam v. Dutch*, 8 Mass. 287; *Lamb v. Durant*, 12 Mass. 54; *Carter v. Willard*, 19 Pick. 9; 3 Kent (5th edit.), 132, 133.

The same principle applies to all other chattels in the same situation. *Pratt v. Parkman*, 24 Pick. 46, 47; *Gallop v. Newman*, 7 Pick. 283.

[*577] *Lady MARGARET FORDYCE v. WILLIS and Others, his Assignees. (1)

8th and 9th Feb. 1701. 24th May, 1792.

(No Entry.)

Parol evidence not admissible to raise an equity, that a pension granted by the Crown to the defendant, was in trust for the plaintiff, against the oath of the defendant in his answer. (1) On the grant of a pension to A. without his knowledge or consent. Parol evidence rejected to show that A. was intended a trustee for B., who was a feme covert. *Secus*, if A. had permitted his name to be so used; and that might have been proved by parol.

This bill prayed that the defendant Willis might be declared to be a trustee of the pension of 150*l.* in the bill mentioned for the plaintiff,

(1) The Editor thinks it may be acceptable to subjoin a copy of Sir J. Simeon's MS. note of this case, which seems to afford some particulars unnoticed by Mr. Brown:—

FORDYCE v. WILLIS. (In Chan. Hil. T. 1791.)

Mr. Atkinson, during the administration of Lord North, had procured a pension of 150*l.* a year, for the plaintiff, Lady Margaret Fordyce, as she alleged, she being married. It was

and that he might be directed to execute a declaration of trust thereof accordingly, and likewise a power of attorney, to authorize the plaintiff to receive the arrears and growing payments thereof, and to deliver up the grant or warrant of the said pension.

For this purpose the bill stated, that, in the beginning of the year 1782, application was made to government for a grant of a pension for the plaintiff, and that government agreed to grant her a pension of 150*l.* per annum, but that the plaintiff, being at that time a married woman, and living separate from her husband, it was necessary the grant should be to some person in trust for her: that Richard Atkinson, deceased, had the management of all the plaintiff's money concerns, and proposed that Richard Willis (father of the defendant, James Willis), should be such

granted in the name of the defendant, Willis, without any trust declared upon it, during the King's pleasure. Willis had never been applied to for permission to use her name, nor, as far as appeared, knew anything of it until after the death of Atkinson, which happened in the year 1785. No money ever had been paid to Willis on that account, nor to the plaintiff specifically on that account, from anything appearing in the cause, although she had drawn upon and received moneys of Atkinson on a general account, and which payments were said, but not proved, to have been made on account of the pension.

Atkinson kept possession of the grant to the time of his death.

Parol evidence was offered of Mr. Robinson, then secretary of Lord North, and others, to prove that Willis's name was meant to be used in trust only. It was said also, that there was evidence that Mr. Willis had himself admitted it was a trust, but none was read to that extent.

The parol evidence was admitted *de bene esse*, but the arguments proceeded chiefly upon the admissibility of the evidence; the effect of it (supposing it admissible, and supposing it sufficient evidence of his Majesty's intention,) being admitted sufficient to raise the trust.

Lloyd for defendant argued it was inadmissible as being against the deed, and in effect to contradict it; and that this upon all principles of evidence could not be, although where such evidence is consistent with the deed it may be admitted, unless excluded by statute, as in cases upon the statute of frauds.

Thus at common law, upon a fine or a feoffment, if no use was averred by deed or writing, parol evidence might be admitted of the use intended, for this was only to rebut the resulting use. But if any use was averred as to the feoffee and his heirs, &c., or any other use, parol evidence could not be given to show another person was intended to take.

So before the statute of frauds, parol evidence was admissible of a trust of land, if no trust was declared, being only to rebut the resulting trust. Since that statute no parol evidence can be given of a trust, though resulting trusts are saved by the statute, as being out of the mischief, and parol evidence may be admitted to prove a fact upon which the trust may result; as upon a conveyance to A. it may be proved that B. paid the consideration money, or that B. paid the fine upon a lease granted to A.; the trust results then by operation of law, just as it does upon voluntary conveyance, where he who conveys declares the trust upon part of the estate only, or declares trusts not commensurate with his interest, in which cases the surplus trust results; and these are the only two species of resulting trusts left.

In *Belasis v. Compton*, 2 Vern. 294, mortgagee made a voluntary assignment of his mortgage, and the resulting trust was repelled by parol evidence, to show the assignee was intended the benefit of it, but this was consistent with the deed; parol evidence could not be given to show that a third person was intended to take, and not the assignee, which is the case contended for here. So at common law, and before the statute of frauds, parol evidence inadmissible to contradict or explain a will or writing, though a latent ambiguity, as to the person or thing meant, might and still may be so proved, according to the common distinction.

Scott, Solicitor-General, and Others, contra. — That this case was not affected by rules relating to the trusts of land; and that it was not to contradict but to declare the purpose of the grant, which was silent as to the trust.

That in cases of repelling a resulting trust, or of a will or instrument procured by fraud, you may give parol evidence; and that in the latter case the will or instrument is mediately changed by that evidence, though the decision immediately goes on another principle.

Suppose stock transferred voluntarily by A. to B., shall not the creditors prove by parol that it belongs to A.?

And that the non-delivery of the grant to Willis was a circumstance in itself, which would let in the evidence, supposing it otherwise inadmissible, inasmuch as the right was not complete in Willis till the grant was delivered to him.

Lord C. agreed, that a trust may be declared in such case by parol, but it must be by contract *hic et inde*; and here there was no such contract, for Willis never agreed to be a trustee; and that his present opinion was to dismiss the bill, though he would not then make the order. He observed, at the same time, that the evidence was of such a nature as would be extremely dangerous to admit of the royal intention on such a grant, and might be perverted to the worst purposes.

trustee ; but he being of an advanced age, it was afterwards proposed that the name of the defendant, James Willis, should be inserted in the grant, as grantee thereof, and that his name was so inserted. The bill then set forth a warrant for a pension of 150*l.*, dated 19th March, 1782, to James Willis. And the bill further stated, that such grant was delivered by the officers of the treasury to Richard Atkinson, in whose custody it continued till the time of his death, and was never delivered, or even shown to the defendant Willis ; that, at the time the said pension was so granted for the benefit of the plaintiff, similar pensions of 150*l.* per annum were granted to each of the plaintiff's sisters, Lady Ann Lindsay and Lady Elizabeth Lindsay ; and that her said two sisters, being then unmarried, the pensions were granted to them in their own names ; that Richard Atkinson died in 1785, and that, upon his death, the grant of the pension was found by Robert Mure, Esq. one of his executors, among the papers of said Richard Atkinson, intermixed with other papers relative to the money concerns of the plaintiff ; that after the death of Atkinson, [*578] the defendant Willis was requested to meet Robert Mure and *the plaintiff at plaintiff's house, to settle the proper mode of receiving the arrears and growing payments of the pension ; when, the grant being produced by the said Robert Mure, the defendant Willis surreptitiously took the warrants, and refused to redeliver the same, alleging (though he knew the same to be untrue), that probably the warrant was intended for himself, as Mr. Atkinson was his great friend ; and the defendant left the house, and took with him the warrant : that the defendant Willis afterwards declined insisting on the grant being for his own benefit, but pretended, if he was a trustee for any person, it was for Atkinson, though Robert Mure, the executor of Atkinson, disclaimed the same, and declared that the plaintiff alone was entitled to it ; that no application had been made by Willis for such pension, nor had he ever received any payments on account thereof : that a meeting was proposed between the plaintiff, the defendant Willis, and other persons acquainted with the transactions, which Willis, at first, promised to attend, but which he afterwards declined : that a commission of bankrupt was issued against the defendant Willis, 3d of November, 1788, and the other defendants were chosen assignees : the plaintiff, therefore, charged that the defendant Willis's name was used only as a trustee for her ; and, among other things, she charged, that Atkinson kept an account of the fortune to which the plaintiff was entitled, and that an account thereof was found among his papers after his decease ; and that the article, "pensions, 300*l.*" mentioned in the paper in the schedule to the bill, alluded to the aforesaid pension of 150*l.*, together with another pension of 150*l.* granted to the plaintiff, on certain revenues in Scotland, and which make up the sum of 300*l.*, and is a proof that the grant of the said pension was intended by R. Atkinson for the plaintiff.

The defendant Willis, by his answer, said, that he could not set forth why his name was made use of in the grant, save that he believed, from the action and conversation of Atkinson, that his, the defendant's name, was inserted in said grant for his benefit, and not in trust for the plaintiff ; and that, about twelve months after the date of the grant, Atkinson gave the same to the defendant, and said, there was something for him, and desired him to go to the treasury and receive the same, or used [*579] words to that effect ; that he thereupon cast his eye over *the grant, and thanked Atkinson for it, he having promised the defendant to use his interest with administration to procure something for him ;

and the defendant did therefore think that the grant had been obtained by Atkinson for the defendant's own benefit; and the defendant was confirmed in that belief, as Atkinson had not, either before or since the said grant, obtained any pension or emolument for the defendant; that, upon his receiving the grant, he went to the treasury, where he was informed the grant had not been registered, and therefore the pension could not be paid; that he thereupon waited on Atkinson, who desired the defendant would give him back the grant, and he would get it registered, and that he never afterwards received back the grant from Atkinson. He said, the first time he heard of said grant was from Atkinson, as aforesaid; and that Atkinson never did, to the best of his recollection or belief, give him any intimation that his name was used in the grant as a trustee for any person, or require the defendant to execute any letter of attorney to enable any other person to receive the same. He admitted that similar pensions had been granted to the plaintiff's sisters in their own names, and that the grant was found by Mure among Atkinson's papers. He admitted the meeting at plaintiff's house, but said it was for the purpose of having an explanation relative to plaintiff's claim of the pension; that Mure produced the warrant, and that defendant claimed it as his own; and, after some conversation, took away the warrant, which he stated to be in the hands of the co-defendants, his assignees, having been delivered to them, among other papers, at his examination before the commissioners. He admitted having declined being present at the second meeting, because the particular friends of the plaintiff were to be present. He said, that he never was informed by Atkinson that his name was used in the said grant, in trust for the plaintiff, or anything of that kind.

The assignees, by their answer, claimed the benefit of the grant, on behalf of themselves and the other creditors.

The plaintiff, having, after the filing the bill, discovered the paper mentioned in the schedule, an order was obtained for amending the bill; and it was accordingly amended, by adding that fact; and a joint answer was put in by all the defendants, *denying their knowledge [*580] whether Atkinson kept any account of the plaintiff's fortune, or whether such paper was found among Atkinson's papers; or whether the words "pensions, 300*l*." did or did not include the pension of 150*l*.; but defendant Willis again denied his belief that the said pension was granted to him in trust for the plaintiff; and the defendants insisted that the said words "pensions, 300*l*." in said paper, was not any proof that Atkinson intended the grant of the pension for the benefit of the plaintiff.

The cause was heard the 8th and 9th days of February, 1791.

Mr. *Solicitor-General*, for the plaintiffs, stated the facts, as stated in the bill, and the prayer. That the application to the Crown was for the extension of its bounty to this family; that two pensions had been granted, one on the Scotch, the other on the English establishment; that the grant on the Scotch establishment was in the name of Mr. Montgomery, who had never disputed its being in trust for the plaintiff; that the pension on the English establishment was granted to Willis, and that it would be most clearly made out in evidence, that this was also intended to be in trust for the plaintiff; and that Willis, in his answer, had spoken with little regard to truth. That the instrument was always kept in the hands of Atkinson; who had, in writing (i. e. by the schedule), declared the trust thereof. Mr. *Solicitor* then offered to read evidence.

Mr. *Lloyd*, for the defendant, opposed the reading parol evidence, as inadmissible.

Mr. *Mansfield*, and Mr. *Campbell*, maintained the admissibility of the evidence, as not tending to show the meaning of the deed to be other than appeared on the face of it, but purporting only to raise a trust; and that, with respect to personal estate, there was no objection to a trust being raised by parol, the statute of frauds applying only to land. *Nabb v. Nabb*, 10 Mod. 404.

Mr. *Lloyd* maintained his objection against reading the evidence, as being contrary to the written instrument, which purports to be a [*581] grant to Willis, without any terms. Evidence can *only be read in cases of resulting trusts, or trusts arising by implication of law, where the party has paid the consideration. Here it appears, by the answer, that the grant was delivered by Atkinson to the defendant Willis, and was never in the possession of the plaintiff; and that Atkinson never mentioned his intention that it was for any other person than Willis himself, and parol evidence will never be admitted against the positive oath of the party. This is a case where the King was imposed upon, if one person was declared, and another person intended to have the pension: parol evidence cannot be read in such a case.

LORD CHANCELLOR.

This proceeds upon a trust arising from the intention of the donor, but where there is no declaration of such donor's intention; and the question is, whether parol evidence can be read to prove the intention of the donor.

Mr. *Solicitor-General*.

There are two very different questions. The first, whether this evidence can be read against Willis. The second, whether he can object the intention of another, as the intention of the donor. With respect to the first, the statute of frauds applies only to lands, tenements, and hereditaments; and extends only to deeds or wills. If it required an act of Parliament to exclude raising trusts by parol as to lands, it must have been such trusts raisable by parol as to personal estate. With respect to the intention of the donor, he having disposed of his whole interest by the gift, it is difficult to say, that the donor shall object to reading evidence, to show the intention of the donor, who has no longer any interest left.

Mr. *Solicitor-General* then stated the evidence to be,

A deposition of John Robinson, Esq. (late secretary of the treasury), that, in the beginning of 1782, applications were made to government for warrants for pensions to the plaintiff and her sisters; and the witness, as secretary, received directions for such warrants; but it being suggested by

Atkinson, that questions might arise, touching the plaintiff's pension, [*582] she being then *under coverture of Alexander Fordyce, Esq. it was requested that the warrants for plaintiff's pension should be made out in the name of trustees; and Lord North having consented thereto, the warrants were accordingly made out in the names of Willis and Montgomery, for the benefit of the plaintiff, Mr. Atkinson having brought those names to the treasury, as the persons wished to be the trustees; and that the deponent always understood that the pensions so granted were not intended either for Willis or Montgomery, but for the plaintiff.

Lady Ann Lindsay (sister to the plaintiff), by her deposition, corroborated this evidence; and stated conversations with Atkinson, on the subject of the pensions; and that Mr. Atkinson proposed that the defendant's name should be made use of in the grant of the pension on the English establishment; and that Atkinson afterwards told the plaintiff (in deponent's presence), that Mr. Montgomery's name stood in the grant of her

pension on the Scotch establishment, and the name of Mr. Willis in the grant of the pension on the English establishment. She further proved that Atkinson paid the plaintiff the pension till his death; and that upon her applying to him about a year before his death, for the last half year of her pension, Atkinson told her, she should be paid the next day, but that he had been careless enough never to have received her pension on the English establishment in the name of Willis from the treasury, but he would forthwith receive the arrears of the pension; which the deponent believed he never did.

This witness, and Mr. Mure, proved the exhibit to be the handwriting of Atkinson; and Lady Ann spoke to the article of "pensions, 300*l*." as part of plaintiff's annual income, being the two pensions of 150*l*. each, on the Scotch and English establishments.

Lord Balcarras (the plaintiff's brother) deposed also to Atkinson's proposing Willis as a trustee, and to a conversation with Willis after the death of Atkinson; in which Willis said, that if the witness would bring together the parties concerned in granting to him the pension, said to be for the plaintiff, he would meet them, and, if he was convinced that the pension was intended for the plaintiff, and not for him, he would give up his pretensions.

*Mure also spoke to his producing the paper found among Atkinson's, at the meeting at the plaintiff's, and that he had laid the same upon the table before all the parties; that in the course of the conversation, the defendant took up the paper, and carried it away with him, but denied that he delivered the paper to the deponent; or that he (the deponent) obtained the same as executor of Atkinson.

Mr. *Mansfield*, and Mr. *Campbell*, argued, from the conduct of the defendant Willis, that it amounted to an admission of the trust: that a parol declaration of the defendant Willis would be admissible, and this was equally strong, and if *any* parol evidence was admissible, *all* was so.

Lord CHANCELLOR said, it struck him as a difficult thing what to do upon circumstantial evidence in a case of this kind, that the awkwardness of the case arose from employing a man whom nobody knew, without taking any declaration of trust from him, and without calling for payment for so long a time.

The cause came on again the next day.

Mr. *Lloyd*, for the defendants. Though this cause is of no great importance, in point of value, it is of great consequence to have this matter settled in point of precedent. I have therefore made all the inquiry I could, but it is surprising how little is to be found concerning it. It is not clear either way, whether parol evidence can be admitted. The question is, whether the parol evidence of third persons, declaring the intention of the parties, at the time the pension was granted, can be admitted in a case where the grant is unambiguous, where there is no fraud or surprise, and where the deed as absolutely vests the interest in the grantor, as in a feoffment. There is no case, before the statute of frauds, where the deed was complete, that notice could have been averred contrary to the feoffment or assurance, 4 Bacon Abr. 442, 695, where the use was expressed in the deed, no other use could be averred; but where there was no use, there the averment was admitted. Here the grant to the defendant Willis is as complete as a conveyance under the statute of uses, where an use is declared.

*Lord CHANCELLOR. The common doctrine is, that an use [*584]

might be averred, subsequent to the statute of uses, Lord *Anglesea v. Altham*, Pigott's Recoveries, 55, 2 Salk. 676.

Mr. *Lloyd*. There is a great difference between the use being averred to have resulted to the party himself, and a trust raised for third persons; this is an endeavor to raise a trust for third persons. A resulting trust can only arise by operation of law, 2 Atk. 150. It results if not disposed of. It may be prevented from resulting by parol declaration; but that is different from raising a trust for third persons. In *Bellasis v. Compton*, 2 Vern. 294, there being an express use, it barred the resulting trust. Parol evidence can never be admitted where the deed is clear. Cheney's Case, 5 Rep. 68, is of a latent ambiguity, the two sons being of the same name. The statute of frauds has not made any difference as to the admissibility of evidence in these cases. The case of *Loufheld v. Stoneham*, 2 Str. 1261, shows that the Court will not admit parol evidence to explain a will of personalty. And the same was held in the case of *Brown v. Selwyn*, Forrest. 240, and the Earl of *Inchiquin v. O'Brien*, 4 Burn. Eccl. Law, 122. I cannot find a case where the Court has raised a trust in such a case, or where the Court has said that, upon a complete instrument, they will admit parol evidence to explain the intention. In *Kirk v. Webb*, Pre. Ch. 84, in the argument of the counsel for the defendant, it is said, "it must be considered, how it was before the statute of frauds, and how it would be since; before the statute, it was never held to be a trust, unless there were a declaration in the deed to that purpose, and much less can it be so since the statute; for, by the statute, there can be no trust, unless it be declared in writing (which is not in this case), and if it be a resulting trust, it is made so by parol proof, contrary to the deed, which is directly contrary to the statute; and would introduce all the mischief that it is intended to prevent." It will be difficult to distinguish this case, in point of mischief, from that of the executor. That is, that if a man makes a will, and appoints an executor, and does not dispose of the residue, the executor shall take it; and no parol evidence shall be read to oust him of his legal right, though he may produce evidence against the next of kin in support of his legal right, *Lady Osborne v. Villars*, 2 Eq. Cas. Ab. 410;

Brown v. Selwyn, For. 240, where the parol evidence was refused [*585] against the executor's legal right. In *Bellamy v. Burrow*, For.

97, it was not pretended that, if the patent had been perfect, parol evidence could have been read to raise a trust. It has been lately determined in the Common Pleas, that a trust cannot be raised in such an office. Suppose A. was to transfer stock to B. without any trust declared, and the creditor of A. was to file a bill against B., and B. to swear there was no trust, B. could not be turned, by parol evidence, into a trustee. Suppose a father purchased a personal annuity for a son who was emancipated, could he be permitted to prove, by parol, that it was for another son; though, if he paid the money for it, it might raise a trust for himself?

Lord CHANCELLOR. Is there any case, where the purchase was made for a stranger, of its being turned into a trust?

Mr. *Lloyd*. The admission of parol evidence is as dangerous now, with respect to personal, as real estate.

But even supposing it admissible, the acts of the parties, here, are too slight to raise a trust. The Court has always said, that, for that purpose, the evidence must be clear and indisputable.

Robinson says, applications were made on behalf of the plaintiff and Lady Ann Lindsay, but does not say *by whom*; but that Atkinson proposed the warrant should be made out to persons as trustees, to the best of his

knowledge. Nothing can be so uncertain as this : it is from mere recollection since the year 1782. That is really the only evidence that is material, for Lady Ann only says, the plaintiff drew on Atkinson, and was paid by him ; but she might draw on him for sums to the same amount on other accounts. Atkinson seems never to have settled with Willis, whether he should or should not be a trustee ; and, in fact, kept the king's bounty in his own power. Lord Balcarras was only informed of the facts, as sworn to by Atkinson. He does not say, Willis declared he was a trustee, but only, that if he was satisfied it was so intended, he would withdraw his pretensions. Mure says he produced the papers : nothing is to be drawn from his evidence ; but it shows, that, in his idea, there was a dispute as to the right to the warrant ; and that Willis took it up before them all, claiming it as his property. Atkinson lived till *1785 ; nothing was done in that time on the trust. Willis swears [*586] Atkinson gave the warrant to him, as something for himself, and that it was returned to Atkinson only for the purpose of being registered, and remained with him till his death. It is hardly probable, had the intention been as the plaintiff contends, that Atkinson would have left it so long in uncertainty, and never have informed Willis that he was a trustee ; it is impossible that if he meant him to be so, he should have never made any declaration to that effect, before witnesses.

Mr. *Solicitor-General*, in reply.

Mr. Lloyd has confounded two things, that are perfectly distinct.

Whether parol evidence can be admitted to contradict a deed, is one thing. Whether it can be admitted to raise a trust where the deed is not contradicted, is another. The question here is, whether circumstances might not exist to convert the legal estate of A. B. to a trust for the benefit of C. D. If one gives a legacy to A. there is not a doubt that it might be shown to be in trust for B. ; there is no doubt that parol evidence might be admitted of a conversation to show it was so intended. I admit this sort of case has been determined on the ground of fraud.

Put the case, that the application was made expressly for Lady Margaret, and agreed to on the part of the Crown, that it was supposed to be the best way to grant it to Willis, and therefore it was granted to him. If parol evidence could not be admitted, suppose Lady Margaret's circumstances changed, she could not give it up, but Willis might insist upon it against the Crown : surely it would be competent to the Crown to show, there was no communication with Willis, and that he was meant merely to be a trustee ; yet this must be, and could only be, by parol evidence.

If one make a conveyance in favor of a son, but does not deliver it, but gives it to a third person to keep till the son does a certain act for his younger brother, the delivery not being complete, would it not be competent to the father to show for what purpose it was put into the hands of a third person ?

*Lord CHANCELLOR. If he delivers it to a third person, except [*587] as an escrow, the deed is complete.

Mr. *Solicitor-General*. The case of *Bellamy v. Burrow*, never could have been determined but upon the idea, that a trust might be raised by parol.

Lord CHANCELLOR. I have been so accustomed to consider uses as averrable, that I should have thought it might be raised by parol. Perhaps, when looked into, the cases may relate to feoffment, not to conveyances by bargain and sale, or lease and release. Suppose, before the statute of frauds, a conveyance had been to A. and his heirs, to the use of

A. and his heirs, you might have proved a trust as well as before the statute of uses. If you could have proved the use before the statute, a trust might be averred since. But no use, ever, could be averred against an express declaration of trust. If it is a general maxim, that with respect to personalty, the case is the same now as before the statute, the use must be averrable. (a)

Mr. *Solicitor-General*. In *Dyer v. Dyer*, in the Exchequer, a purchase was made by the father, in the name of the son; it was held, that *primâ facie*, it was an advancement; but the father might by parol, at the time, declare the son a trustee.

Lord CHANCELLOR.

Here is no presumption of a trust. If any trust is declared, it must arise *ex contractu*. Suppose the declaration of the Crown, clearly expressed, it is purely a grant of bounty, upon motives of honor; the question is, whether parol evidence can be received in such a case.

Mr. *Solicitor-General*. Atkinson must be presumed to have paid the pension as the agent of the Crown.

Lord CHANCELLOR. The evidence goes to prove, that he paid the pension *quâ* pension, but it was never registered. I have great doubts, whether you can go to the treasury, and get it out of the servants there, in conversation, for whom the Royal bounty was intended. It will [*588] be extraordinary to gather it from *them. No account is given why the interest was not put an end to. In 1785, there might have been an application to the Crown. As to the King's having any bounty towards Willis, if I was to indulge conjecture, I cannot so readily conceive it, as that it was towards a Lady of a great family, who was in want of it; I will not absolutely dismiss the bill now.

But his Lordship, by order 24th May, 1792, dismissed the bill without costs. (b)

(a) See 2 Story, Eq. Jur. ch. 24, § 972.

[It is remarkable how little is to be met with in the books upon this subject. It is clear that the 7th section of the statute of frauds only extends to declarations of trusts of land, which requires, not that they shall be created, but that they shall be manifested and proved by writing. *Forster v. Hale*, 3 Ves. 696; *Randall v. Morgan*, 12 Ves. 74. Declarations of trust of personal property are therefore in the same situation as all declarations of trust were before the statute. The Editor has, however, not been able to find an instance of a declaration of trust of personal property, evidenced only by parol, having been carried into execution. The case of *Nab v. Nab*, 10 Mod. 404, which is usually cited for the proposition (*Sand. on Uses*, 251; *Roberts on Frauds*, 94), is merely a dictum of Lord Macclesfield, the trust having been established on the admission in the answer. — *Eden*.]

(b) See 2 Starkie, Ev. (5th Am. ed.) 572, 573, and note (b).

ATTORNEY-GENERAL *v.* NASH.

Lincoln's-Inn-Hall, 15th, 17th Jan. 1791. 24th May, 1793.

(Reg. Lib. 1791. A. fol. 568. b.)

Testatrix gave the residue of her personal estate to trustees to "cause to be erected (1) and built a dwelling-house, to be appropriated for the use of a school-house." To a bill praying that the charity might be carried into effect, a demurrer that the charitable legacies were void, allowed. (1)

CATHERINE NASH, being possessed of very considerable personal, but not seised of any real estate, made her will 12th of June, 1783, and after giving legacies to several persons therein named, gave "all the rest and residue of her real and personal estate of what nature, kind, or sort soever" to three of the relators, and to the defendants, and a person since deceased, their heirs, &c. upon the following trust, viz. "upon trust, that they the said trustees, their heirs or assigns, or the major part of them, should, as soon as conveniently might be after her decease, cause to be erected and built within that part of the parish of St. Peter, as is within the borough of Droitwich and county of Worcester, a dwelling-house or tenement of such size or dimensions as they, her said trustees, should see proper and expedient, and that the same, when erected and built, should be by them the said trustees appropriated for the use of a school-house, for the purpose of educating, clothing, and maintaining such a number of poor boys and girls, parishioners within the said parish, as her said trustees and their heirs should see proper, and find the interest, produce, and profits of her said real and personal estates sufficient to support and maintain, according to the true intent and meaning of her will," and gave several directions for the government of the said school, and then went on thus: "and she did thereby direct and empower her said trustees, out of her real and personal estate, to purchase such spot of ground within the said parish of St. Peter, as they should see proper, for the purpose of erecting the said house or school upon" — and appointed the said plaintiffs and defendants executors.

*Treadway Nash, the brother of the testatrix, after her decease, [*589] got possession of her will, and also of the property, and prevailed with the other defendants to renounce the probate of the will, which occasioned a contest in the spiritual court, where, after a decree in favor of the will, probate thereof was granted to the relators, who being advised that so much of the will as directed the purchase of a spot of ground for the purpose of erecting the school was void by the Mortmain Act, but that, if a spot of ground of the description in the testator's will could be procured by other means than purchase out of the estate of the testatrix, they might erect a school thereon, purchased, with their own

(1) Though it was Lord Hardwicke's opinion, that a bequest in trust "to erect" an hospital school, &c. was good; since it did not necessarily imply that land was to be bought for the purpose literally (see *Vaughan v. Farrer*, and *Attorney-General v. Bowles*, 2 Ves. 182, 547, vide Supplement to Vesey, 322, and 404, 406); that doctrine has been repeatedly overruled: and the modern cases seem to have established, that such expression is to be taken as meaning that land is to be bought, unless the testator has clearly indicated the contrary. Vide *Attorney-General v. Hyde, Ambler*, 751, antea, 1 vol. 444, notes; *Foy v. Foy*, 1 Cox, Ca. Ch. 163; *Chapman v. Brown*, 6 Ves. 404, 408, &c.; *Attorney-General v. Parsons*, 8 Ves. 186, 191; *Attorney-General v. Davies*, 9 Ves. 535, 544. For cases where the testator's intention was considered as clear that the money should be applied for a purpose to be conducted on land already in mortmain, and as being therefore valid, see *Attorney-General v. Williams*, postea, 4 vol. 526; *Attorney-General v. Parsons*, 8 Ves. 186; *Attorney-General v. Manby*, 1 Meriv. 327, and *Henshaw v. Atkinson*, 3 Madd. Rep. 306.

money, a proper spot of ground, which they had conveyed to them, and which, by the present bill, they offered to give and appropriate to the charity.

The bill, therefore, prayed an account of the testatrix's property, and that the charity might be carried into effect.

To so much of the bill as prayed, that the charity might be carried into execution, the defendant Treadway Nash demurred, and showed for cause of demurrer, that the charitable legacies [as stated by the information and bill] were void in law, [and ought not to be carried into execution.]

The cause was heard at Lincoln's-Inn-Hall, the 15th and 17th of January, 1791.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *Cox*, in support of the demurrer.

The general scheme of the will is, that money is to be raised out of the real and personal estate, to purchase ground, and to build the house : which is contrary to the Mortmain Act. In *Vaughan v. Farrer*, 2 Ves. 182, Lord Hardwicke went a great way to support the charity ; but, even upon his own principles, he could not have maintained the present case. He there held, that there was no direction to lay out any part of the money in purchasing land, for that *erect* as much imports foundation as building, and that if any person would give a piece of land, they might build upon it. In *Gastrel v. Baker*, cited in that case, there was no direction to buy land, the words were " in order to, and towards erecting a school," and Lord Hardwicke thought the trustees might hire a house.

But in this case, the trustees are directed to buy land upon which [*590] the school is to be built. *Indeed, if they had been directed by the will to hire a house, it would have been the same thing as if the testatrix had given a leasehold estate, which would undoubtedly be bad. The *Attorney-General v. Bowles*, 3 Atkyns, 806, comes somewhat nearer the present case, as there was something like a direction to purchase land : the question was, whether the bequest was void, and it was held to be so, as the money was directed to be laid out upon real securities. Personal estate, to be laid out in land, is no more to be given by the statute than land itself. Here the testatrix has been incautious enough to direct her trustees to lay the money out in the purchase of lands, and it is impossible her want of caution can be made good by the caution of the trustees, in obtaining land by other means. Lord Hardwicke, in the cases already cited, has, it is true, said, that if anybody would give land, or there was land already in mortmain in the parish, that the trustees might build upon it. In *Attorney-General v. Tyndall* (ante, vol. i. p. 444, n. ; Amb. 614 ; (2) Highmore on Mortmain, 100), Lord Northington, with these authorities before him, and upon great consideration, for the case came before him upon an appeal from the Rolls, was of a different opinion. He thought that a direction to purchase land, not to build on land that came by other means ; that supposing Bowles's case to be right, still that, in that case, the testatrix meant the ground to be purchased with her money ; that to make her go a begging for land, was not within their intention. This is an authority, that goes the whole length of the present case. In the *Attorney-General v. Hutchinson* (ante, vol. i. p. 444, note, and reported by Mr. Ambler, 751, by the name of *Attorney-General v. Hyde*), though there was a piece of ground already in mort-

main in the parish, the testatrix not having pointed to it, Lord Bathurst held the devise void. Where the devise is not good at the testator's death, it cannot be made so by anything which arises after. This was held in *Widmore v. Woodroffe* (Ambl. 636), where the devise was declared void, because the corporation for Queen Ann's bounty, are bound by their rules to lay out the money in land; though the Crown has power to make new rules, it was held, that it must be regulated by the rules in being at the testator's decease. In *Pelham v. Anderson* (ante, vol. i. p. 444, note), (3) a bequest to build and erect an hospital was held void. Lord Camden thought it impossible to separate the one part from the other. It is true, where there is an option to the trustees *to [*591] lay the money out in land, or in such a way that it may continue personal, the Court has carried it into execution in the way that was legal; this is the ground upon which *Soresby v. Hollings* (Highmore, 74) was determined. In the *Attorney-General v. Goulding* (ante, vol. ii. p. 428), the gift of the eight freehold houses to the charitable use being void, Mr. Justice Buller thought the gift of the personal fund, that was annexed to the houses, was void also. In *Foy v. Foy*, (4) Rolls, 1st February, 1785, which was a gift of 1000*l.* toward the erection, &c. of an hospital for the county of Gloster, Lord Kenyon directed an inquiry, whether there was any hospital in the county to which it might be applied; and in the *Attorney-General* against The Bishop of Oxford (ante, vol. i. p. 444, note), he declared he could not vary the use, by ordering a repair where the testator ordered a building, for he said the intention must be implicitly followed, or nothing could be done.

Mr. *Attorney-General*, Mr. *Mansfield*, and Mr. *Stratford*, in support of the charity.

The first question is, whether, notwithstanding the bill states land to be ready for the purpose of building the school, the gift is void; and, with respect to this, we may observe, that wherever the direction is only to erect and build, without any necessity to purchase land, it may be so done as not to be within the statute. None of the cases before the Court have been upon the subject of amelioration only of land already procured, but where land must necessarily be purchased; where that is not the case, the statute does not apply. Therefore, in *Harris v. Barnes*, Ambl. 651, money left to be laid out in repairing a chapel was held not to be within the act: the note of that case gives the true sense of the statute of mortmain, that it was to prevent the increase of lands, &c.; whereas, where the object of the gift is only the amelioration of land already in mortmain, not an acre more gets into mortmain than was so before. According to the cases of *Vaughan v. Farrer*, and *Attorney-General v. Bowles*, the charity, in the present case, may be supported without infringing upon the statute. In the former of those cases Lord Hardwicke thought, that, if anybody would give land, they might build upon it; so here, if a house could be obtained, it would be unnecessary to build one; if land could be obtained, an house *might be built; but, in this case, the building [*592] of an house is unnecessary; for, though the meaning of erecting an hospital is, that the patients may be together, and, if there is no house, the general intention cannot be executed, it is not so of a school; the education of children does not induce the same necessity, it may be carried into execution without a room being appropriated to it. The

(3) 2 Eden, Ca. Lord North. 296.

(4) 1 Cox, Ca. Ch. 163. See also 6 Ves. 409.

present case is said to be within the case of the *Attorney-General v. Tyndall*, that it is a direction to purchase land. It is said, in that case, that a direction to build is a direction to purchase, and that the Court would have directed the trustees (except for the statute), to lay out money in land upon which to build; then it can make no distinction, whether the testator directs the building of an house, which cannot be done without land, or he directs land to be purchased. In the *Attorney-General v. Lady Downing*, Amb. 555, Mr. Attorney-General York took notice of the distinction between the *Attorney-General v. Tyndall*, and the *Attorney-General v. Bowles*, and the Lord Chancellor agreed to the distinction, and said, in the *Attorney-General v. Tyndall*, the intention was to purchase land; but, in the present case, in directing a purchase of land, she only meant, in case it should be necessary; she did not mean to preclude her trustees from accepting a donation of land, which would increase her fund. If the cases before Lord Hardwicke are right, those before Lord Northington must be wrong, as to this point. In the case of *Grimmet v. Grimmet*, Ambl. 210, money to be laid out in the funds, till it could be laid out in land to the satisfaction of the trustees, was held not within the statute, because it might remain forever in the funds. In the case before Lord Bathurst (*Attorney-General v. Hyde*, Ambl. 751), his Lordship thought, that the case before Lord Northington had overruled that before Lord Hardwicke, and he seems to think that the testator must have some particular piece of land in mortmain in his contemplation: and in fact it turned out, in that case, that there was no land. In *Pelham v. Anderson*, it was not made part of the case that there was any land. The *Attorney-General v. Goulding* is very distinguishable; the very import there was, to bring the people together; the principal intention could not take place without a breach of the statute of mortmain; and therefore that which was consequential only could not take place. As to applying it *cy pres*, the cases stand as they did, untouched by the statute of [*593] mortmain, as in the case where the gift was to *such lying-in hospital as the testator should appoint (*White v. White*, ante, vol i. p. 12), and the testator made no appointment, the Court applied the bequest; so in the case of superstitious uses; it was to be applied to a charitable use.

Mr. *Solicitor-General*, in reply.

The question is, whether the intention in this case can be legally carried into execution. In order to discover this, it will be necessary to make some observations on the cases. The principle to be drawn from them is, that, in every case upon a will, where there is a direction to endow a school or hospital, and no land already in mortmain is pointed out on which the building is to be, it is void, although the erection of the school or hospital be the principal thing in the intention of the testator; and the cases are uniform, where there is a direction to purchase, that the gift is void. In *Foy v. Foy*, (4) Mich. 1785, the proposition is laid down, that where the gift is for erecting and endowing a school or hospital, there the Court implies that a purchase is to be made: in that case the testator gave 1000*l.* towards the erection and endowment of an hospital in the county of Gloucester; it was not the sole fund, but in aid of a subscription for that purpose; and Lord Kenyon (then Master of the Rolls) referred it to the Master, to inquire whether there was an hospital. The next clause in the will was, "I give 800*l.* for the purpose of erecting

(4) 1 Cox, 163.

and endowing a school." On these two clauses the determinations were different; the former was referred to the Master, because, the testator pointed to the hospital, which was then erecting; but, as to the latter, his Honor declared it void, and said he should have declared the other void also, if there had not been an hospital existing. The principle is this, that though Lord Hardwicke, in *Vaughan v. Farrer*, following the case of *Gastril v. Baker*, said, if any one would give land, the charity should be supported, yet he never meant to say, that a gift to erect and endow simply was not void: the distinction is, that where the situation is pointed out, and is already in mortmain, the gift is good; where it is not so, it is bad. Then the question is, whether, here, the testatrix has pointed to any land already in mortmain. The intention of the statute was to prevent improvident disherisons, as well as to prevent more land from coming into mortmain. If the direction was to hire land for *the school, it would be equally void; but, in the present case, [*594] there is an express direction to buy land; even without mentioning it, the Court must imply it, for otherwise the executors might wait to all eternity for a person to give land. To say, that a testator means the execution of the charity should be kept expectant till somebody will give land for the purpose, is impossible. If such a thing can be supposed, it must be a gift within some reasonable time; but here no such thing is pointed out. The case of the *Attorney-General v. Hutchinson*, is said to be a stronger case than *Attorney-General v. Bowles*, because there was a piece of land; but where the testator does not point the land out, he is not presumed to mean it. It did not occur to anybody there to argue, that the having a school was the principal intention, and that it could be carried into execution without a school-house. Would the testatrix have given the charity, unless the purchase and building were to take place? An intention cannot be implied, that she meant it to be built on land to be given by another, or that the executors were at liberty to adopt any piece of land so given. Where a man gives a charity, he means it to be erected at his death, or soon after, — not to wait an indefinite length of time for a gift of land. *The Attorney-General v. The Bishop of Oxford* lays it down, that you must execute the testator's whole intention implicitly. Lord Kenyon, in that case, would not execute the intention *cy pres*. If the testator were to say, I give 1000*l.* to be laid out in a building, according to an estimate, which amounted to 2000*l.*, that would exclude the possibility of laying any part of the money out in land; but if he does not so point it out as to exclude the idea of purchase, it must be implied. But here the intention is pointed out; for, in the last clause, she empowers and directs the executors to purchase land, and it is the same thing whether the direction is in the first or in the last clause. What has happened in the Downing cause shows, that there is in this country a manner of making lands inalienable forever, and so there would be as to money, if it was not to be laid out at some determinable time.

Lord CHANCELLOR had, during the hearing, thrown out doubts whether, supposing a certain sum given for the purchase, and another for the endowment, the former being void, would make the latter so likewise. At the close of the argument, (5) he *threw out some gen- [*595] eral ideas on the subject, to the following effect: —

(5) The following is from Lord Colchester's MS. note of the judgment in the first instance: —

Lord Chancellor. — "I cannot conceive it possible to argue with a shadow of reason, that

Whether the testatrix gave land, or money to be laid out in purchase of land, either would be positively within the rules of law, and consequently void : but money given to improve charity lands, is not a laying out in lands or devising lands. In the case of the legacy of 1000*l.* (*Foy v. Foy*), (6) there was no application to land, but in the case before Lord Bathurst he thought it must be the intention of the testatrix, that the land should flow from her as well as the other parts of the charity. But it does not strike me, that this is a necessary implication. On the terms of the will, I think she did not know the statute, and that she intended part of the fund, if necessary, to be laid out in land. But she meant principally the charity to be executed. She directed therefore the purchase in order to give it scope : but surely it would not defeat her intention, if the land came *aliunde*. But Lord Bathurst thought it equally her intent to give the land, from a vain-glorious motive. But if it is to be so construed by the spirit of the law, we shall go but a little way if we do not save them by a distinction, that where the principal intent is to effectuate the charity, that intent will be satisfied by the land coming *aliunde*. I cannot conceive that it would disappoint her intention, if the whole land came *aliunde*. The question is, whether authority given to the executors, to lay out the money in land, will bring it within the statute. If land were given, I think it clear the executors could not keep back one shilling of the bequest from the maintenance of the charity.

His Lordship, by order 24th May, 1792, allowed the demurrer. (7) (a)

land already in mortmain may not be meliorated to any extent by building upon it, or in any other manner. Waste land may be cultivated. For lands may be drained ; and it is a main object of public policy that they should be so. Those improvements do not add a single acre to the quantity of land in mortmain ; and if so, why should not the lands already in the hands of the charity be made as productive as possible. If fifty cases had been so decided, unless they had afforded me some solid principle for their decision, I should not think them worth much notice. It is in vain to furnish imaginary constructions of the act. It never can be strained so far as to prevent the building on land already in mortmain ; therefore, I really think, that point may be laid out of the case. The true question here is, whether it is an essential part of the testatrix's purpose, that land should be purchased of her own bounty, or whether the carrying on the charity is the principal object, and the purchase of land is only required by testatrix, in case those who are to execute it cannot find scope for that purpose in point of local situation, *aliunde*, and from another hand than her own."

(6) 1 Cox, Ca. Ch. 163.

(7) Vide 8 Ves. 191, and note (1), ante, 588.

(a) See *Grievs v. Case*, 1 Ves. jun. 548, and Mr. Hovenden's note in 1 Supp. 203, 204 ; S. C. 4 Bro. C. C. 67 ; *Blanford v. Thackerall*, 4 Bro. C. C. 394 ; S. C. 2 Ves. jun. 238 ; *Atty. Genl. v. Williams*, 4 Bro. C. C. 526 ; *Henshaw v. Atkinson*, 3 Madd. 306 ; *Atty. Genl. v. Wilson*, 2 Keen, 680.

PYE v. DAUBUZ (1) and Another.

Lincoln's-Inn-Hall, 13 March, 1791. 24th May, 1792.

(Reg. Lib. 1791. B. fol. 289.)

Tenant in tail makes a mortgage, with covenant for further assurance, and becomes bankrupt, his assignees are bound by the covenant. (2)

THE bill stated, that Benjamin Nankwell, being seised in tail of lands and tenements in Cornwall, but representing himself to be seised in fee, borrowed 800*l.* of the plaintiff, on the security thereof, and by indentures of mortgage of 21st and 22d December, 1780, conveyed the premises to the plaintiff in fee, *subject to a proviso for redemption, [*596] on payment of 800*l.* and interest, and Nankwell covenanted with the plaintiff for title, and for further assurance. In June, 1789, a commission of bankrupt issued against Nankwell, and a bargain and sale (afterwards duly enrolled), of his real estate, and an assignment of his personal estate was made by the commissioners, to the defendants, who were chosen assignees. The bill further stated, that the whole of the principal, and a great arrear of interest, remained due, besides a further sum of 200*l.* advanced to the said Benjamin Nankwell, on bond, and that the plaintiff had discovered, since the bankruptcy, that the said Benjamin Nankwell was (under the will of his father) only tenant in tail of the mortgaged premises, but that the fee-simple is vested, by virtue of the bargain and sale enrolled, in the defendants. The plaintiff, therefore, by the bill insisted, that as he was entitled by virtue of the covenants to have called upon Nankwell, if he had not become a bankrupt, to have suffered a recovery of the premises for making a further assurance thereof to him, that the assignees standing in his place, were bound so to do; and therefore the bill prayed an account, and that the defendant might be decreed to pay what should appear to be due, or be foreclosed.

The defendants, by their answer, admitted the facts, but submitted to the Court, what interest Benjamin (being tenant in tail only) conveyed to the plaintiff by the mortgage-deeds, and in whom the fee-simple was now vested, or whether the plaintiff would have been entitled to have called upon Nankwell (had he not become bankrupt), to suffer a recovery and make further assurance, and whether the plaintiff was entitled to a conveyance from them as assignees, and further submitted to act as the Court should direct.

Mr. *Solicitor-General*, and Mr. *Steele*, for the plaintiff, argued that the assignees were bound to do all acts that the bankrupt himself, had he continued solvent, would have been bound to do. *Taylor v. Wheeler*, 2 Vern. 564. They take the estate affected by every equity with which it was affected in the hands of the bankrupt, and the plaintiff is entitled to come against the assignees for every remedy he could have against the bankrupt; and therefore the fee having become absolute in them, they

(1) Mr. Dickens also took notes of this decision; but they are very inaccurate; his report stating that the plaintiffs did not claim under a regular mortgage, but merely under a deposit of title-deeds, which was held equivalent. It is most probable he was misled by some dictum to that effect by Lord Thurlow, who had decided that precise point a year or two before, in *Ex parte Wills*, in the matter of *Taylor*, lately reported, 2 Cox, 233.

(2) S. P. with the principal case, *Edwards v. Applebee* (above cited), ante, 2 vol. 652, note, per Lord C. Northington. See also *Ex parte Wills*, 2 Cox, 233, above cited in note (1). See also *Taylor v. Wheeler*, cited 1 P. W. 279, 280.

[*597] were bound in the same way he would have been, had he suffered *a recovery which would have let in the incumbrance. *Edwards v. Applebee* (ante, vol. ii. p. 652, n.) is a case in point with the present.

Mr. Mitford, and Mr. Stanley, for the defendants.

When the mortgagor is only tenant in tail, the act done by him does not bind his assignees. The act 21 Jac. 1, c. 19, § 12, vesting the fee-simple in the assignees by the bargain and sale, is not for the purpose of giving the incumbrancer a better title, but merely for the benefit of the creditors; it was so determined in *Beck v. Welsh*, 1 Wils. 276, and that the bankrupt could only convey for his life, and he being dead, in that case the mortgage was at an end. The mortgagee can only be entitled to what he could take from the bankrupt. The assignees only hold it for general creditors, not for the mortgagee. In the case before Lord Northington, he does appear to have decreed the assignees to join; we must admit that to be a strong case against us: but it does not appear what was said in that case. If that case prevail, it will have a strong effect as to persons taking mortgages from tenants in tail, as it would give them a title (in case of bankruptcy), that the bankrupt at the time could not give without the concurrence of tenant for life, which, under this case, he might do without. (†)

Mr. Solicitor-General, in reply.

The statute operates as a recovery; (†) then, the equity arises out of a different ground, the bankrupt's having agreed that the land should be charged, which agreement would bind the land in equity. The plaintiff would have had an equity against the bankrupt, to make good the title by further assurance, and his equity is the same against the assignees; and he might come here, and call upon the assignees to make it good, just as the bankrupt ought to have done. The covenant for further assurance operates in the same manner with an original covenant to make an effectual charge. It does not appear that in *Beck v. Welsh*, there was any covenant for further assurance.

LORD CHANCELLOR (during the argument, and at the close of it) said, the cases appeared to be directly contradictory: that he was not aware of the case in *Wilson*, which appeared to have been determined with [*598] great deliberation, and by great judges; yet the *argument in that case did not appear to him satisfactory. The Court there held the incumbrancer not to be let in: considering the statute as declaring the use of the bankrupt's estate for the benefit of all his creditors. He should have agreed with Lord Northington in a different construction of the statute, conceiving its object only to be [merely to save] the expense of a recovery; (3) and that its effect would be, to let in the incumbrance, and to convey not only all that the bankrupt had conveyed, but more: there-

(†) N. B. There is great weight in this argument, and it may be enforced by Lord Mansfield's reasoning in 1 Bur. 118, which is only in substance a maxim of the law, viz. that no man can by his own wrong acquire an advantage to himself. (Serjt. Hill.) — *Eden*.

(†) *Qu.* This is begging the question, for the real question is not how, but for whom, it operates, and suppose the commissioners were never to execute the authority given them by 21 Jac. 1, c. 19, s. 12, over entailed lands. *Qu.* Whether a mortgagee could compel them? The same stat. 21 Jac. 1, c. 19, enacts, that the statute relating to bankrupts shall be construed in the most beneficial manner for creditors. N. B. In the case in 1 Wils. the bankrupt was dead, and therefore could have made no further assurance. N. B. Creditors under a commission cannot take advantage of a covenant to renew a lease or perform a special agreement, and it seems the rule should be reciprocal. (Serjt. Hill.) — *Eden*.

(3) "For the purpose of barring the issue and the remainders over, and not to alter the disposition of the estate to the prejudice of any liens at law or in equity prior to the bankruptcy." — From Sir J. Simeon's notes.

fore if the case in the Common Pleas had not been cited, he should have adopted Lord Northington's construction; but that Mr. Lloyd said, the case in the Common Pleas had been acted upon in the Exchequer, and it would be improper to let that case stand at law, and to determine otherwise in equity.

The cause at present stood over; (4) but on the 24th May, 1792, his Lordship made his decree, that the defendant should redeem the mortgage; or stand foreclosed, and execute proper conveyances of the mortgaged premises, to the plaintiff and his heirs. (5)

(4) At the desire of the Solicitor-General (now Lord Eldon). — Sir J. Simeon's MS.

(5) Of so much of the estates comprised in the indenture of lease and release as was vested in them as assignees, under the commission of bankruptcy against Benjamin Nankwell. — R. L.

DAVIDSON v. FOLEY.

Lincoln's-Inn-Hall, 12th July, 1791. Hil. Vacation, 1792. 24th May, 1792.

(Reg. Lib. 1791. A. fol. 610.)

The warrant of attorney to confess judgment is an assurance, within the annuity act, 17 Geo. 3, and therefore, if the memorial enrolled under the act does not recite it, the memorial and all subsequent proceedings are void. (1) After the bill filed, the cause shall not stand over to enrol a new memorial.

THIS cause, which is stated upon the demurrer, vol. ii. p. 203, came to a shorter conclusion than was expected.

It is there stated that previous to the suing out the writs of *scire facias* and *elegit*, the plaintiffs caused a memorial of their securities to be enrolled according to law. This statement, which was that of the bill, was sufficient for the purposes of that report: but, in fact, though a memorial of the bonds was enrolled, the warrants of attorney to confess judgment were not comprised in the memorial; it being supposed that the former was a full compliance with the annuity act of 17 Geo. 3, c. 13, which requires "that a memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall be granted for one or more life or lives, or for any term of years *determinable upon a [*599] life or lives, shall be enrolled in the Court of Chancery," and that it was unnecessary that the warrant of attorney should be included in the memorial.

At the hearing of the cause on the 12th of July, 1791, and subsequent days, it was argued by the counsel for the defendants, that for want of the warrant of attorney being recited in the memorial, it was defective; and the defect fatal, for that the warrant of attorney was an assurance within the act of Parliament.

It stood over, in order that the plaintiffs might bring an ejectment to try this point, which, however, was not done: and the matter was brought on again in Hilary vacation, 1792, when

(1) See *D. Bolton v. Williams*, postea, 4 vol. 297, and 2 Ves. jun. 138, and the cases in the Editor's notes, *ibid.* It is to be observed, that the above and all other cases in these reports under the annuity act, must be considered as referable to the act of the 17 Geo. 3, c. 26, only. By the late act, 53 Geo. 3, c. 141, the provisions made by the first-mentioned act have been repealed, and other provisions substituted in lieu thereof. In all cases, therefore, subsequent to the above act of the 53 Geo. 3, reference must be to that act alone.

Mr. *Solicitor-General*, Mr. *Mitford*, Mr. *Grant*, and Mr. *Alexander*, for the plaintiff, argued two points—

That it was not necessary a memorial of the warrant of attorney should be enrolled.

That, if it was necessary, that the cause might stand over, and a new memorial be enrolled comprising the warrant of attorney.

The arguments were very long, but the substance of them were as follow:

The act (§ 3,) requires, "that every deed or instrument, by which any annuity is *granted*, shall be enrolled within twenty days;" all therefore that is required to be enrolled, is the instrument by which the annuity is granted. But the warrant of attorney to confess judgment, cannot be said to be the instrument by which the annuity is granted. It does not operate as a grant, it does not modify it, the grant is complete without it: its only operation is to prevent the necessity of an adverse proceeding previous to the entering up the judgment; it is, therefore, not within the words of the act. It is impossible to conceive it to have been within the intent of the person, who drew the clause in the act: where the bond is the instrument by which the annuity is granted, an instrument that only enables persons to enter up judgment on that bond, could not be [*600] intended to be included. *Where acts of Parliament refer to instruments, they refer to them by their known names; but the warrant of attorney is not among the instruments enumerated in the third section of the acts, "Bond, Instrument, or Assurance." It is the duty of the legislature to speak of instruments according to their nature: but they could not mean to include the warrant of attorney; as they refer to instruments specifying the consideration, which, though the bond does, the warrant of attorney does not, further than as it refers to the bond. It refers to instruments that contain the names of the parties, for all the parties' names are to be specified; but all the attorneys of the Court are parties to the warrant of attorney. If it is necessary to enrol this, it would be necessary to enrol many things which could not be intended to be enrolled. Suppose a fine was necessary to make good the title, or a recovery, must the memorial recite the fine or recovery? But, in fact, in the present case, even if the warrant of attorney was necessary to be enrolled in annuities granted now, this would operate as an *ex post facto* law, the present grants being previous to the passing of the act, which could not be intended to affect subsisting titles. The judgment here, not the memorial, is the ground on which the plaintiffs come. It is not the memorial that entitles the plaintiff to have the obstacles removed.

But, suppose the memorial necessary, and also that it is necessary that the memorial should comprise the warrant of attorney, we may enrol a new memorial, and introduce it there. There are many cases in which the Court will let causes stand over, for the purpose of doing acts which are necessary in order to the plaintiff's remedy, where he has a right to it. Something analogous to this, was done in *Curtis v. Curtis* (ante, vol. ii. p. 620), where, in a bill for dower, the defendant, in his answer, said, the plaintiff was never married, and that there were no lands of which she was dowable. At the hearing of the cause, the Lord Chancellor retained the bill for a year, to give the plaintiff an opportunity of trying her right. Upon a writ of dower brought by the plaintiff, a writ went to the bishop to try the marriage, who certified that the plaintiff was lawfully married: and on the second plea as to the husband's seisin, the widow had a verdict. She died, and upon a bill of revivor, the question was, whether

her representatives had a right to an account; and decreed that they had. This, in principle, is a *case similar to the present. [*601] The present is a bill to clear the way to a legal right, and the Court ought to make such a decree, as will make way for the execution of the judgment. Something of the same sort was done in *Stephens v. Olive* (ante, vol. ii. p. 90); there, after the bill filed to try the validity of a voluntary settlement, the cause stood over for the purpose of the plaintiff's suing out an *elegit*; an *elegit* was accordingly sued out, and returned *nilil*. There, when the cause came first on, the plaintiff had not sued out his *elegit*, and had not entitled himself to recover. So, in *Dormer v. Fortescue*, 3 Atk. 124, at the time of the bill filed, the plaintiff had not a right to recover: he was obliged to come to this Court to remove terms, and produce the settlement. These cases show that the Court will let causes stand over, in order that the plaintiff may try his right at law; and not put him to file a new bill. So, where a party has got a wrong administration, the Court will permit him to take out a right one; though he had no title to recover at the time of the bill filed. So, where a clergyman sues in the Exchequer for tithes, before induction, though he has no title till induction, yet, as induction will give him a title from the vacancy, the Court would let the cause stand over for him to obtain induction. So, though no tithes were due at the time of filing the bill, they would give an account of tithes due at the decree, though, in either of those cases, he had no title whatsoever at the time of the bill filed. The distinction is, that when the plaintiff has such an interest as enables him to come into this Court, they will enable him to effectuate his legal right. Here, the plaintiffs had sufficient interest, as judgment creditors, to be put into such a situation, by having the terms removed out of their way, as would enable them to get execution. So, in a bill for specific performance of a contract to purchase an estate, it is sufficient if the vendor have a complete title at the time of the decree, though he had not at the time of the bill filed. If a bill was filed for performance of an agreement, and at the time of the cause being heard, the agreement was not stamped, the Court would let the cause stand over, to get it stamped, although the act requires that agreements shall be stamped within twenty-one days, and that time should have expired before the hearing of the cause, and, of course, the plaintiff, at the time of filing the bill, had no title. On these grounds, the plaintiffs have established a right to an immediate decree; or to have the cause *stand over that they may have a [*602] new memorial enrolled, upon which they may afterwards proceed to execution. The only question is, whether they shall be sent to enrol such memorial, and then file a new bill, upon which they must have the same remedy that they seek by the present bill.

Mr. Mansfield, Mr. Lloyd, and Mr. Richards, for the defendants.

There being no such memorial as the act requires, the suit must fail: without such memorial, the inquisition and *elegit* are gone. The bill is brought on the ground of removing legal impediments from their executing their judgment at law; then it must suppose that they have judgment at law, otherwise the whole must fail. The bill recites, that the defendants gave bonds and warrants of attorney to secure the payment of the annuities; and that the plaintiffs caused their securities to be enrolled; the fair sense of the words is, that the warrants of attorney, as well as the bonds, were enrolled: so that the whole foundation of the bill is disproved; for there being no legal memorial, there was no judgment, no *scire facias*, no *elegit*: therefore, it is not as a case of irregularity; but they were in a

situation that they could not obtain an *elegit*: and the removing terms out of their way would be to no purpose, as, by positive law, they can have no judgment. It is not like a case standing over to bring parties before the Court, who, when there, will have a right to sue; or to try rights at law, which, when established, will give the plaintiffs a right to a remedy here; but the question is, whether a party, who can have an execution at law, can maintain a suit here? The word *action*, in the act of Parliament, must extend to every court of equity as well as law. All the cases, as to the right of suing, have the phrase *equitas sequitur legem*; then, if a person, from any defect of title, cannot maintain his suit at law, can he have it in equity? Can an alien, or a Roman Catholic recusant, who cannot bring an action, file a bill? The legislature meant the annuitant should not proceed any where, without enrolling the security. If there had been no memorial, a plea of that would have been sufficient. Then, there being a memorial that was illegal, cannot put them in a better situation.

[*603] *A cause was never ordered to stand over for the purpose of enabling a party who had no right at the filing of the bill, to comply with legal requisites which he had not complied with before the bill filed. There is no case of the Exchequer permitting a title cause to stand over that the plaintiff might be inducted. Suppose, in the present case, they had come here with a warrant of attorney on which they had never entered up the judgment, could it have stood over for the purpose of their entering it up? They might just as well come without a judgment, as without a memorial. There is no case in the books, that a judgment creditor can come here to have impediments removed out of the way of his execution before he has sued out execution at law. He must show that he has gone as far at law as possible, before he filed his bill here. The case in *Atkyns (Dormer v. Fortescue)* does not touch, in the slightest degree, upon the present case. Suppose them, now, to enrol a new memorial, how could they bring it upon the records of the Court? They could not bring it on by amendment. It would be absurd to bring matter into the suit by amendment, which was contradictory to the claim made in their original bill. Then, the only method would be by supplemental bill; but the same objection applies; the matter would not be supplemental, because contradictory; and supplemental matter must always be consistent with that which goes before. A totally new case cannot be introduced by a supplemental bill. The foundation here is gone, the bill being filed by persons as judgment creditors, who have no judgment.

Lord CHANCELLOR (during the argument, and at the close of it) expressed great doubt as to both the points. He seemed to think, that whatever made part of the security, must be comprised in the memorial; and that, as the judgment must be founded on the warrant of attorney, the warrant of attorney ought to appear; as, otherwise, the Court could not gather that there was a warrant of attorney to support the judgment. He said, all he could gather from the cases, was, that where the Court could see there was a good judgment, it would not stop without aiding that title by what is called an equitable *elegit*, but he could not carry it higher than that: that the *equitas sequens legem* must be such as to assure the Court that the case was such as it could be followed by a legal execution; [*604] but that where *it appeared that the judgment could not be followed by a legal *elegit*, the Court could not follow it by an equitable *elegit*. That, in this case, he considered the memorial as necessary to the judgment, and that if he was satisfied that the warrant of attorney

was not an assurance, yet he should not be justified in determining so contrary to the opinion of a court of law, which, in the case of *Hodges v. Money*, in last Hilary term (reported in 4 Term. Rep. 500), had only held, that where the consideration was expressed in the bond, it need not be so in the warrant of attorney, but must be taken to have held that the warrant of attorney was an assurance, as, otherwise, they would have contradicted the third section of the act.

He expressed more doubt on the second point, whether he should not now permit the parties to enrol the securities, and by amending the bill, bring the matter upon the record. He agreed, that as the matter now stood, it amounted to a nonsuit; but as, supposing a proper memorial enrolled, the plaintiff's title would be perfect, he doubted whether he should not admit them to supply circumstances ancillary to the relief sought, or should put them to the filing a new bill. In the cases put, nothing new appeared upon the record. In that of a specific performance, if the party was able to make a title at the time of the decree, the time did not appear when he became able so to do. So, in the case of an unstamped instrument, it was only hearing the cause one day instead of another, and the instrument, at the hearing, would be stamped. It was the same in the case of the administration. This would be like the case of the stamp, if the stamp bore a date upon it, because then it would appear, upon the record, that it was subsequent to the filing of the bill. His Lordship said, if the cause stood over for the purpose of enrolling the memorial, he did not see how it could be brought on the record but by a supplemental bill. (2) (a)

But, on the 24th May, 1792, his Lordship made his decree in these terms: "declare that the plaintiffs, not having registered proper memorials before they filed their bill, let the bill be dismissed out of this Court without costs against Edward Foley and Lord Foley, and against the other defendants with costs to be taxed."†

† In a case of *Sherston v. Oxlade*, 26th June, 1792, the Court of King's Bench expressly treated the warrant of attorney as a security within the act. Vide 4 Term Rep. 824.

(2) Any substantive facts occurring after a bill filed, which are material to the Court's taking cognizance of the case, or to giving the plaintiff any relief at all, must be introduced by supplemental bill; but where a plaintiff only adopts a set of subsequent circumstances by amendment, after they have been in part stated in a defendant's answer, and controverts their effect, or states any such posterior circumstances, as a Master would take into his consideration under the decree in an original suit (such as subsequent matters of account, *et similia*), these collateral matters, it seems, are properly subjects of the original suit; and are not to be introduced by supplemental bill. See Lord Redesdale's Treat. 3d ed. Milner v. Lord Harewood, 17 Ves. 144, *Knight v. Matthews*, 1 Madd. Rep. 566, and *Adams v. Dowding*, 2 Madd. Rep. 53.

(a) 2 Madd. Ch. Pr. (4th Am. ed.) 444, 445. In regard to the right to file a supplemental bill, and the uses of such a bill, see 1 Barbour, Ch. Pr. B. 1, ch. 12, § 5, p. 362 - 364.

[*605]

*JACKSON v. LEVER and Others.

In Court, Easter Term, 24th May, 1792.

(Reg. Lib. 1791. A. fol. 599. Entered *Jackson v. Bamford*.)

A contract that the one party shall convey an estate, and the other shall grant an annuity, shall be carried into execution, though the vendor died previous to any payment of the annuity (one having accrued due, and having been tendered). (1) A memorial of such contract need not be enrolled under the annuity act, 17 Geo. 3.

THE bill stated that Sir Ashton Lever, Knight, deceased, being seised in fee, of considerable real estates in Lancashire, subject to a mortgage of 10,000*l.*, and other incumbrances, caused several parts thereof to be advertised for sale by public auction, in order to discharge such incumbrances; and several parts thereof were sold to various persons, some for money considerations, and others in consideration of annuities to be granted by the respective purchasers to the said Sir Ashton Lever for his life.

That the plaintiff became the purchaser of certain messuages lying at Middleton, then in the possession of himself and the widow Bamford, in consideration of an annuity of 280*l.* a year; and a contract was entered into, bearing date July 27th, 1787, whereby Sir Ashton agreed to convey the fee-simple and inheritance of the premises therein described, to the plaintiff, his heirs, and assigns; he and they yielding and paying to the said Sir Ashton, and his assigns, an annuity or clear yearly rent of 280*l.*, payable quarterly, at the usual days; the first payment to be made on the 25th of December then next. The premises were sold, subject to a lease, Sir Ashton to have the rents till Michaelmas then next. And it was provided, that in case Sir Ashton Lever should happen to die before the 29th day of September then next, the contract should be absolutely void, and Sir Ashton's heirs not bound to convey the premises. And the plaintiff further agreed, that for securing the said sum of 280*l.* a year, the said premises should be conveyed to such trustee, and in such manner, as the counsel or attorney of Sir Ashton should advise; and that, as a further security, the plaintiff would procure and give good and sufficient landed security, to the satisfaction of Sir Ashton's counsel, for the payment of the said annuity of 280*l.* to the said Sir Ashton; in which securities all such powers and remedies should be comprised for recovery by Sir Ashton Lever, as his counsel should advise.

A short time after entering into the contract, plaintiff delivered [*606] to the defendant, Milne, who was the agent of Sir Ashton *Lever, the title-deeds and other particulars of certain estates whereof the plaintiff was seised, which, together with the purchased premises, were intended to be made a security for the annuity of 280*l.*; and the defendant, Milne, having examined into the titles, &c., of the said estates, declared himself satisfied with the security, and promised to prepare the conveyances for carrying the contract into execution.

Sir Ashton Lever survived the 29th September ensuing the date of the contract, but, in consequence of some delays, the defendant, Milne, did not prepare the conveyances before the 25th December, 1787. On or

(1) *S. P. Carter v. Carter* (A. D. 1733), *Forrester*, 271, and *Mortimer v. Capper*, ante, 1 vol. 156, quod vide. See also *Akhurst v. Jackson*, 1 *Swanston*, 85. The principal case, and the doctrine upon which it depends, has been frequently approved by Lord Eldon, C. See (inter alia) in *Coles v. Trecothick*, 9 *Ves.* 216; *Paine v. Miller*, 6 *Ves.* 352, &c.

about the 29th of the same month, plaintiff waited on the defendant, Milne, and offered to pay him, on behalf of Sir Ashton Lever, the quarter's annuity which had then become due; but he declined receiving the same, saying that the conveyance would be very soon completed, and that it was not necessary for him to make such payment in the mean time; nor would the defendant, Milne, receive any money from any of the annuity purchasers, until the conveyance was ready.

The defendant, Milne, afterwards prepared the conveyances, and sent them to London, to be settled by counsel, from whence he received them, on the evening of the 1st of February, 1789; but on that day Sir Ashton Lever died, after a sudden and short illness of only two days, so that none of the conveyances were, or could be, executed by him.

Sir Ashton Lever left the defendant, John Lever, his heir-at-law, and in his lifetime had made a will and codicil, whereby the defendants, Bamford and Milne, were appointed his executors, and others of the defendants claimed different interests; in particular, he devised real and personal estates to the defendants, Bamford and Milne, by sale or mortgage, to raise such sums as would pay his debts, legacies, &c., without the aid of his personal estate, which was not to be disposed of till the death of his wife.

The plaintiff by the bill, charged, that the contract was fair and advantageous to Sir Ashton Lever, had he lived, and that he had declared himself satisfied therewith, and that he had often *declared [*607] himself fully determined to perform the same as soon as he should be enabled so to do, by having redeemed the mortgage of 10,000*l.*; that the death of Sir Ashton Lever, at any time after the 29th September, 1787, was not an event provided for or guarded against by the terms of the contract, or in contemplation of the parties, at the time of entering into the same; nor was there any probability of that event happening so soon afterwards, as it did; on the contrary, Sir Ashton then was, and continued till within a few days of his death, in good health and spirits, and likely to live for several years; and that the offer to pay the first quarterly payment of the annuity, and the delivery of the title-deeds of plaintiff's estates, ought to be taken as a part-performance of the said contract on his part, being all that was incumbent on him to do previous to the final completion thereof; and therefore he insisted, he was entitled; in a court of equity, against the devisees in trust of Sir Ashton, in the same manner as he would have been against Sir Ashton himself, if still living.

The bill therefore prayed a specific performance of the contract, and that proper parties might be decreed to join in conveyances of the premises to the plaintiff.

The material defendants admitted the facts, to which they did not impute any fraud; they admitted that Sir Ashton Lever was satisfied with the contract, and the probability that he might have lived several years; but said his constitution was much broken by several severe illnesses; and, submitted, as he died before the contract was completed, whether it ought to be specifically performed, and the plaintiff ought or ought not to have the conveyance, as prayed by the bill.

There was evidence, on the part of the plaintiffs, of frequent conversations of the witnesses with Sir Ashton Lever, and of his satisfaction in the bargain; that the annual value of the estate, contracted to be sold to the plaintiffs, was under 40*l.* a year; and of the general state of Sir Ashton Lever's health; that, though he had had the gout in his stomach, once or

twice, he was in general in good health and spirits, and died of an illness, of not above two or three days; he dying on Friday, 1st February, 1788, and the witnesses speaking to his being well, holding the conversation [*608] above stated on the Monday and Tuesday preceding, and *inviting the witnesses to dine with him on the Friday following, when he expected the contracts to be executed; and the defendant, Milne, particularly, swore to the particulars of the transaction with plaintiff, that the rent of the premises in the possession of the widow Bamford was 13*l.*, and of those in possession of plaintiffs 22*l.* 11*s.* 6*d.* per annum; that the premises in possession of plaintiff might have been purchased for 840*l.* in money, being the price or value fixed on the same by persons employed for that purpose: that the premises in the possession of the widow Bamford might have been purchased for 850*l.* in money, subject to the leases granted thereof, that being the price fixed for the same. He likewise deposed to the plaintiff's deposit of title-deeds, relating to lands and buildings belonging to the plaintiff, which he approved on the part of Sir Ashton Lever; the offer to pay the quarter's annuity; that he prepared a conveyance to another of the annuity purchasers, and sent the same to London, to be perused by Mr. Sidebotham; which draft, together with a draft of a memorial of the grant of the annuity, to be registered, were received back by the witness, the evening before the day of the death of Sir Ashton; and the conveyance to the plaintiff, and grant of annuity and memorial, were intended to have been engrossed agreeably to the draft, altering names and circumstances; that one reason for the delay in the completion of the contract, was owing to a purchaser of a part of Sir Ashton Lever's other estate not paying his purchase-money pursuant to his contract, which prevented Sir Ashton Lever from discharging a mortgage affecting the premises; and another reason, the witnesses not receiving the draft till the time mentioned.

The defendant's witnesses, generally, and particularly a physician and apothecary, swore to his constitution, though naturally robust, being much broken, through various means; and that his life, at the time of the contract, was very precarious, he being frequently subject to attacks of the gout; and his sudden death occasioned by an apoplectic and paralytic stroke, to which he must have been long incident. The persons who valued the estates swore to the respective values of Bamford's (under these circumstances) to be then worth 855*l.* 5*s.*, and plaintiff's to be 793*l.* 2*s.*

The cause was heard Easter term, 1792.

[*609] *Mr. *Solicitor-General*, Mr. *Mansfield*, and Mr. *Brown*, for the plaintiff.

The cases which apply to the present are *Mortimer v. Capper* (ante, vol. i. p. 156), and *Pope v. Roots* (7 Bro. P. C. 184). Neither of them have the circumstance of the parties having contracted that the whole should be void, if the seller should not live till Michaelmas. In *Mortimer v. Capper*, the contract was fair, and could not be affected by the sudden death of Capper. An inquiry was directed, as to the value of the estate, and of an annuity for the life of Capper, but the parties were so well satisfied with the opinion of the Court, that they never brought it back for further directions. The reference to the Master, however, shows what the opinion of the Court was: but, in the present case, the parties having agreed, that, if the grantee of the annuity should not live to a certain day, the bargain should be at an end, was bargaining that if he did live, it should be carried into execution. In the case of *Pope v. Roots*, there is this difference, the first quarter's annuity there had not been paid; in the present

case, it had been tendered, which is equivalent to payment, the reason of the refusal was, that Sir Ashton Lever's agent had not done what was his duty to do. Sir Ashton had the annuity as long as he lived, and might have probably had it for many years. In the case of *Carter v. Carter, Forrester*, 271, A. devised 8000*l.*, to be laid out in land, and settled to the use of B. in tail, remainder to C. in fee; B. and C. agreed, by articles, to divide the money in the manner there mentioned; B. the tenant in tail died without issue, soon after the making the articles, and before any division of the money; C. insisted that it would be a hardship upon him, that B.'s executor should have any part of the money; but the Court decreed, that the articles should be performed and the money divided. That case must have been otherwise decided, if the contingency having taken place had been material to the case. In the present case everything was complete when the contract was made; there is no doubt, but that, immediately, Jackson was entitled to the estate, and could have contracted for the sale of it, and Sir Ashton was in the same manner entitled to, and might have sold, the annuity; so that the whole was legally executed before the death of the party, and it cannot be material how long he lived, whether a quarter, half a year, or a year. In all those events, the *bargain would have been unequal, but the right of parties can- [*610] not depend on the equality of the consideration to the eventual value; and as either party might have compelled the specific performance of the contract, it ought now to be specifically performed, notwithstanding the death of Sir Ashton Lever.

An objection has been started (by Mr. Attorney-General) that the annuity should have been registered, but here it is reserved as a rent, and was to be secured upon other premises besides those that were to be conveyed by Sir Ashton Lever, and therefore, as remaining in covenant, it could not possibly be registered. And it appears, the agent for Sir Ashton Lever had approved of the securities offered, which, being covenanted to be good and sufficient landed securities, must have been land to the annual amount of the annuity, and, therefore, not within the act of Parliament.

Mr. Attorney-General, Mr. Mitford, and Mr. Stanley, for the defendants.

There are two questions, the first arising upon the accident which has happened; the second, whether this contract for the grant of the annuity ought not to have been enrolled. And first, as to the second question, the contract was, that Sir Ashton Lever should convey an estate of about the value of 40*l.* a year, and that Jackson should grant him an annuity of 280*l.*, secured on the lands to be conveyed by Sir Ashton, and should convey other lands to trustees, as an additional security; the covenant was, that he should "procure and give good and sufficient landed security," but what that security was, does not specifically appear: we argue that this contract was within the annuity act, and was not within the exception contained in it. The words of the act are, "that a memorial of every deed, bond, judgment, or other assurance whereby any annuity or rent-charge shall be granted for one or more life or lives, or for any term of years, determinable on life or lives, shall be enrolled in the Court of Chancery," the exception is, "that nothing in the act shall extend to an annuity secured on lands of equal or greater annual value, whereof the grantor shall be seised in fee-simple or fee-tail, in possession at the time of the grant." Here the plaintiff appears manifestly not to be seised of the land, the contract being, that *he shall "procure and give;" so that it [*611] might be land to be purchased or borrowed to make the security; the

words also are "good and sufficient landed security." These words are not sufficiently certain, because the exception is of land of which the grantor is seised in fee-simple or fee-tail, and, "sufficient landed security" might be any of which Sir Ashton Lever's agents might approve; it might be of a leasehold for a long term of years, which would not be within the exception in the act, and yet might be a very sufficient security for an annuity for Sir Ashton Lever's life. There is no instrument in this case, that we can look to, but the contract; if that is defective, by the policy of the act, it is void. The contract should have stipulated, that the security was lands of which Jackson was seised in fee-simple or fee-tail; the act meant, that the security should be specified in order that every body might see that it was sufficient. But though not within the exception, it is certainly within the act, for it is an agreement to pay Sir Ashton Lever an annuity; and it is an engagement equivalent to a grant of an annuity; every grant of an annuity, under the act, must be enrolled; and, therefore, in a case of *Crossley v. Arkwright*, 2 Term Rep. 603, a deed by which a farm and several other things were conveyed, for considerations, one of which was an annuity, not being enrolled, was declared to be void; and here, there being a contract to pay an annuity, though only an equitable grant, is it void, for want of a memorial being enrolled; as it is such a contract that an action would lie upon it for the annuity.

Then, with respect to the events which have happened, if there is no grant of the annuity, there is no consideration for the conveyance; and the death of Sir Ashton Lever, before the contract completed, has put an end to the whole transaction. The real meaning of the parties was, that the whole should be in suspense till the conveyances should be completed. This appears from Sir Ashton Lever's agent refusing to receive the quarter's annuity. We accede to the idea that the annuity was to have its commencement from Michaelmas, and that the first payment was to be on the 25th of December; but the parties all looked forward to a further act to be done. Sir Ashton Lever could not intend to part with his estate on the payment of a single quarter's annuity, without a security for the future payments; he must have looked to the security being completed. [*612] He could not have called upon the plaintiff for payment of the annuity till he had completed his conveyances; nor could he be compelled to convey, till he had a security for the annuity; therefore, an event having taken place, which prevents the completion, the transaction is at an end. Then the plaintiff comes to claim that for which he has not given, and cannot give, as the case stands, any consideration; he comes on the footing of a grant which cannot now be made: that is the ground of the case of *Pope v. Roots*.

Mr. Solicitor-General, in reply.

The contract was complete by the execution of the deed. A contract of this sort, to sell an estate, would be sufficient to revoke a testator's will, and his death could not set it up again. The nature of the property was altered by it; between the period of the contract and the death of Sir Ashton Lever, had he been indebted, and a writ of *elegit* had been sued out against the estate, the plaintiff might have insisted that Sir Ashton held it only as a trustee for him. It is contended, that it is a case of hardship upon Sir Ashton: I say, it is not so. Sir Ashton had all the benefit he contracted for; he bought an annuity; he knew, in its own nature, it must be contingent; he considered the annuity as being worth the estate. It is said, under the act, there can be no consideration; but, as soon as the security was approved by the agents of Sir Ashton Lever, the plaintiff's estate was bound, and he could not have cleared it from Sir Ashton

Lever's charge. Then, as to the annuity act, the plaintiff here does not come for an annuity, but for an estate ; if the contract required registering, it was Sir Ashton's business to register it. It is the grantor's duty to register the deed. If he had come for payment of the annuity, and the plaintiff had set up the defect of the register, the Court might, perhaps, say that, from that defect, he could not recover ; but, although courts of law have said, that the grantor of an annuity, making the objection that there was no memorial enrolled, shall not hold the consideration ; the Court can never take notice of the defect of registration, at the instance of him who ought to register. Here, Sir Ashton Lever could not have refused to accept the annuity on the ground of non-registration. What is the justice of the case ? If it was Sir Ashton Lever's intention to exchange his property for an annuity, he was satisfied with the consideration. It was not the intention of the annuity act to cut *down fair trans- [*613] actions. This is not a deed, bond, or instrument for securing an annuity, within the sense of the first clause of the act. It is an agreement that an estate shall be conveyed, and an annuity shall be secured. It is not within the sense of the clause, as it looks to a future act. In the case of infants, the word "contracts" is contained in the act ; but, with respect to adults, that word is omitted. The act contains severe penal clauses : suppose this had been within them, could a party have been convicted on such a contract as this ? It is only a contract on which a court of equity may compel the grant of an annuity : this could not be contended to be within the penal clauses. What did the legislature mean ? It clearly did not mean to include contracts in the first clause. This is not an instrument for granting or securing an annuity, but a contract that a party will make a future grant, and refers to more complete instruments to be made. It not being under seal, the covenantee could not bring an action for not executing a grant, upon having one tendered for that purpose. It is not necessary to register such a contract, in order to have a specific performance of it, though he must have registered that future deed, in order to have brought an action upon it ; but, upon the previous contract, the remedy is different. With respect to the exception in the act, the covenant to give landed security is equivalent to a covenant to convey land of which he is seised in fee-simple. Under the covenant, Sir Ashton Lever would have a right to such security ; leasehold estate would not do ; Sir Ashton Lever would not be bound to take it, for there might be a covenant with the lessor, to which the Court would not make the annuitant liable. There is no decision of any court, by which the party would be obliged to take leasehold estate as a security. In *Crossley v. Arkwright* it was held, that the grantor, setting up the annuity act as a defence, should repay the consideration-money ; but that is very different from saying, that Sir Ashton Lever can take the benefit of the defect, when it is his duty to register it. This reduces it to the question, whether that has been done in this case, which has been required in other cases. The act was so far complete on our side, that they might have called upon us to pay the annuity, or be foreclosed. But something remained to be done on both sides ; that to be done on their part is to convey the estate.

*Lord CHANCELLOR said there were two questions ; 1st, was [*614] this, in form, a grant of an annuity, or only a covenant to make a future grant ? and, if it was only a covenant to make such future grant, whether it was within the act. (2) As to the rest, I do not see, if an

(2) Such future executory contracts held, both at law and in equity, not to have been within

annuity was contracted for, why the consideration should not be paid. It is objected, the contract cannot be carried into execution *modo et forma*: that has great weight where there has been no payment. But suppose a suit had been commenced for payment of the annuity, would a death, *pendente lite*, have made a difference? I have not considered the cases on this point sufficiently to decide this.

The cause stood over, and upon the 24th May, Lord Chancellor made his decree, whereby he declared that the contract, dated the 27th July, 1787, between Sir Ashton Lever, deceased, and the plaintiff, ought to be carried specifically into execution: and decreed the same accordingly, and gave the necessary directions for that purpose; and for an account and payment of the arrears of the annuity of 280*l.*, the consideration for the purchase of the estate. (a)

the act of the 17 Geo. 3, c. 26. See *Brown v. Douthwaite*, 1 Madd. Rep. Ch. 446, and *Crespigny v. Wintennom* there cited, p. 448 (4 T. Rep. 790). It is again to be observed, that the above act of the 17 Geo. 3, is repealed by the 45 Geo. 3, c. 141, as to all subsequent cases, under which latter act new provisions are substituted.

(a) *Mortimer v. Capper*, 1 Bro. C. C. 157, 158, and notes; 1 Story, Eq. Jur. ch. 4, § 103, 104; ch. 5, § 147-151; *Welch v. Bradbury*, 16 Pick. 375; *Farnham v. Brooks*, 9 Pick. 239-241; 1 Sugden, Vend. & Purch. (6th Am. ed.) 340, 341, 342, [474] to [478.]

[The principal case has been repeatedly recognized and approved of, the principle being, as observed by Lord Eldon, that the party has the thing he bought, though no payment may have been made, for he bought subject to a contingency, 6 Ves. 352, and therefore, on the other hand, if the premises are deteriorated by fire or other accident, before the completion of a contract, the purchaser is bound. *Paine v. Meller*, 6 Ves. 349; *Coles v. Trecothick*, 9 Ves. 346; *Ex parte Minor*, 11 Ves. 559; *Harford v. Purrier*, 1 Mad. Rep. 532; *Akhurst v. Johnson*, 1 Swanst. 85; *Revell v. Hussey*, 2 Ba. & Bea. 287; for if by the contract he has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his, they may be devised as his, they may be assets, and they would descend to his heir, 6 Ves. 352. A purchase before the Master is not complete before confirmation of the report, and therefore a loss by fire after the report, but before confirmation, falls upon the vendor, *Ex parte Minor*, cit. sup. *Twigg v. Fifield*, 13 Ves. 517. — *Eden*.]

GUTH v. GUTH. Rolls, 24th May.

(Reg. Lib. 1791. A. fol. 305. b.)

Specific performance decreed of articles of separation at the suit of the wife, [to allow her the separate maintenance agreed upon,] though the husband offered, by his answer, to receive her again. (1)

THIS was a bill filed by Catherine Lysette Louisa Guth, by her next friend, against her husband John, alias John James Philip Guth, praying

(1) The present decision has always been disapproved of, and Lord Eldon, C. has observed (11 Ves. 532), that it was "the only instance in which a court of equity did enforce such a deed." The embarrassments and anomalies which the courts of law and equity have introduced by facilitating breaches of the marital contract (of all contracts the most solemn and sacred, and the most useful to preserve inviolate), are innumerable and inextricable. Many of these are forcibly delineated by Lord Eldon, C. in the judgment between Lord and Lady St. John, 11 Ves. 529, et seq. His Lordship, there, refers to Lord Loughborough's disapprobation of the principal case, in *Legard v. Johnson*, 3 Ves. 352, 361, &c., and comments on the various authorities up to that time, which had innovated upon the sound and intelligible principle of the ancient law, that the marriage covenant could not be affected by any other contract between the parties. It may be useful to observe, that the decision in *Rodney v. Chambers* (2 East, 283, and explained by Lawrence, J. 6 East, 244), which seems to have been (inter alia) disapproved of by Lord Eldon, C. ubi supra, is now "considered as virtually overruled by the very recent case of *Titley v. Durand*, A. D. 1819, on writ of error, by Abbot and Dallas, Chief Justices." A provision, therefore, by any instrument, for the separate maintenance of a wife, in the event of any future separation, whether with or without the

that an account might be taken of what was due to her in respect of the arrears of an annuity of 100*l.* agreed to be paid to her by her husband, in pursuance of a deed-poll of separation therein recited, and that he might pay the same to her use, as well as the growing payments thereof, as they should from time to time become due.

The bill stated, that the plaintiff and defendant, being natives of Germany, several years ago intermarried together, but that unhappy differences having arisen between them, it was mutually agreed that they should live separate and apart from each other; and, accordingly, a deed-poll of agreement, bearing date the 26th October, 1785, was signed and executed by the defendant for that purpose: whereby, after reciting "that they had mutually *agreed and consented to live [*615] separate and apart from each other from that day; and that the plaintiff, had agreed and consented, on that same day, to go immediately out of the realm of these kingdoms into foreign parts, beyond the sea, and had promised not to molest him, the defendant, in any manner whatsoever, nor to return into these kingdoms without the said defendant's consent, in writing, to that purpose previously had and obtained, and signed by two witnesses; provided that the defendant should not fail, neglect, or leave undone, in any manner whatever, any of the therein-named conditions and covenants by him to the plaintiff thereby made; he, the said defendant, agreed to allow and pay to, or cause to be paid, unto her the plaintiff, or her assigns, the sum of 100*l.* per annum, for the full maintenance of herself and one of her children, named Henry, then with her, during her natural life, and as long as they should so keep separate and apart from each other, by equal quarterly payments, to commence from that day, provided that the plaintiff should conform to the several before-mentioned conditions and agreements; and in case she should contract any debts without the privity and consent of the defendant, and which he should be compelled to pay, that then the agreement should be void."

That the plaintiff, with her youngest child, immediately after the execution of the agreement, went to reside abroad, and had ever since lived apart from the defendant, and had not, during that time, molested him.

The annuity of 100*l.* per annum had been constantly remitted to the plaintiff till the 26th October, 1789; but that from that period, she had only received 10*l.* a quarter from the defendant, who had repeatedly refused to pay up the arrears of the annuity, or to remit the growing

intervention of trustees, would now, it seems, be incapable of being enforced either at law or in equity. With regard to the interference of a court of equity, referable to contracts of separation between husband and wife operating *in presenti*, it is observable, that although courts of equity disclaim to enforce the agreement, as to the point of actual separation, they will yet, in general cases, oblige a husband to perform that part of it, which relates to the payment of the separate maintenance thereby stipulated. Sir W. Grant, M. R., in the recent case of *Worrel v. Jacob*, 3 Meriv. 268, &c., noticed the perplexities in which the courts had found themselves involved, by thus enforcing the minor and auxiliary part of the agreement, whilst they profess to repudiate the principal and essential part and motive of it. Besides this, the point seems even yet unsettled, whether the courts will interfere even as to the stipulated immediate maintenance, if the contract rest only as between the husband and wife, without the interposition of trustees. Lord Loughborough and Lord Eldon, C. (*ubi supra*) much doubted whether the courts should do so; but the question has not been settled. The profession will find this subject well treated in Mr. Roper's modern work on the Law of Baron & Feme, 1 vol. p. 287, et seq., especially 291, 292. And the other points above noticed will be found well classed in the same volume, with references to the latest authorities, &c. from p. 272 to 318. Although Mr. Roper (*ibid.* 293, &c.) thinks great weight is due to the principal case as a deliberate decision, the Editor must again refer to the doubts expressed upon it, by Lord Loughborough and Lord Eldon; especially in 11 Ves. 532, 533.

payments thereof, in the manner stipulated by the above agreement of separation.

The defendant, by his answer, admitted the agreement of separation, but said, that in 1789, having become insolvent, he had compounded with his creditors, and paid his respective debts to the utmost of his ability, and was thereby rendered unable to pay to the plaintiff the whole of the said annuity, and that the sum of 10*l.* a quarter, was to the full extent of what he could afford to pay to plaintiff for maintenance of herself [*616] and child, *and that, in order to alleviate plaintiff's expense, he had offered to take home the child and maintain it himself:

That he is unable, under his present circumstances, to pay to the plaintiff any more than 40*l.* per annum, and which he believed was sufficient for the maintenance of herself and child; but if the same should not be thought sufficient for that purpose, he was ready and willing, and submitted to relinquish the agreement, and take home the plaintiff and her child, and to maintain them with his other children, in the best manner he was able.

There was no proof, except on the part of the defendant, of his insolvency, and having compounded with his creditors; and that his present income, arising from his business, did not amount to more than 300*l.* per annum.

The cause came on in Trinity term last, and was much agitated at the bar; but as the argument and cases cited were repeated and commented upon by his Honor in giving judgment, it is unnecessary to state them.

His Honor, this day, pronounced his decree to the following effect:

Master of the Rolls. The first question upon this agreement, is, what is the real meaning of it: for if it does not amount to an engagement, upon the part of the husband, to permit the plaintiff to live separate, till they mutually agree to cohabit together, this bill cannot be sustained; because he, by his answer, has offered to do so. This has been compared to the case of *Head v. Head* (3 Atk. 547), (2) and said to be a mere temporary agreement, and not intended to be binding upon either party, provided the other was willing to cohabit again: notwithstanding it has been deliberately entered into: but, the true construction is, a *total* separation, until *both* shall agree to cohabit. The recital in this deed, takes no notice of any future cohabitation: for the words purport to be a mutual agreement to live separate from this day; and I do not see how I can annex any other meaning to them, than that of a perpetual separation from each other, unless both parties should jointly wish to live together again. (3) It has been contended, that the clause in this instrument [*617] which stipulates *for the payment of the annuity, must mean nothing more than a temporary argument; and that the words "as long as we shall so keep separate and apart from each other," clearly furnish the construction: now, the condition was, that the plaintiff should live abroad, and take her youngest child with her; and, in consideration of her so doing, he engages to pay to her, or her assigns, 100*l.* per annum, so long as they shall keep so separate, she observing the condition imposed upon her, to go out of the kingdom, and not to return without his consent, or to molest him during her absence; and in case she breaks any of the above conditions, then the agreement was to be at an end; so

(2) And Supplement to Ves. sen. 18, et seq. from Reg. Lib.

(3) "And as to the offer to take her back again, even if it could operate, it should be in writing, attested by two witnesses." From Sir J. Simeon's MS. notes.

that according to the language of the deed, unless there was a direct violation of it on the part of the plaintiff, the defendant could not oblige her to return to him; and it may be clearly inferred from other circumstances, though not proved or disclosed in evidence, that for the future it was meant, by both parties, that they should continue separate from each other, unless, in case of a breach of the conditions contained in the agreement, the one had a right to compel the other to return. Then, the question is, whether, without proof of any other circumstances, than that of a mutual agreement of separation between them, this Court will, upon a bill filed by the wife, compel the husband to abide by it, although he, by his answer, offers to cohabit with her, and might sue in the Ecclesiastical Court for restitution of conjugal rights. It has been suggested, that to enforce such a contract, would be an infringement upon the jurisdiction of the Spiritual Court: but that court can only judge by circumstances, how far it is warranted to pronounce a compulsory sentence against the husband or wife; but with respect to the contract itself for a separation, that court cannot have any right to pronounce sentence upon the agreement itself, or to take into consideration the circumstances upon which it may be founded. In such cases, where parties have been unhappy, and it has been found expedient to enter into such a deed of separation, surely, it was neither necessary nor fit that a wife should proclaim to the public every circumstance which may have occasioned it; neither is it necessary for this Court to know every particular, so as to enforce an execution of it. There are instances, where this Court has determined to enforce such contracts, either with or without a disclosure of circumstances, without the parties resorting to *the Ecclesiastical [*618] Court; and the rule seems to be, that, as against the husband, it will enforce an agreement for a separation, (4) upon a bill filed by the wife, though the husband has declared his readiness to take her home again; the Court will say, these are circumstances, which we must not inquire into. The agreement ought to be deemed mutual, the husband ought to pay the money, and the bill is to compel him to do so. It has been said, that the husband has been compelled to enter into this engagement; and, upon that ground, if he had filed his bill to be relieved against it, the contract might have been rescinded: it does not appear to be the case here; but even supposing such a contract had been obtained from him by some circumstances of coercion; if the wife had been sufficiently guarded, as in the present instance, in respect of her conduct, and observing the conditions thereby imposed upon her, it does not follow, that he is not bound by it: and surely, if it binds his wife, it must bind him, as a mutual agreement; it was his contract as much as hers, and he shall not avoid it, unless he can show a direct violation of it on the part of the plaintiff.

The cases fully establish this principle, the first of which is *Seeling v. Crawley*, 12th November, 1700, 2 Vern. 386, Reg. Lib. p. 71, 1700. It appears from the Register's book, that the defendant, by his answer, had offered to be reconciled to the party, or if she did not choose to return, then to allow her the 160*l.* per annum; and the decree seems to rest upon the particular circumstances of the case. The next case is *Angier v. Angier*, Prec. Chan. 497, or, as it is written in the Register's Book,

(4) Not for a separation: this is inaccurate; but an agreement to allow a separate maintenance, originating in a contract that the wife should remain separate and apart from the husband. See note (1) *antea*.

Engier v. Engier, Reb. Lib. A. 6th December, 1717; a vast number of witnesses were examined: the agreement, as charged in the bill, was admitted by the answer; but it does not appear for how long they were to separate, nor are there any words purporting a perpetual separation; it is admitted by the evidence on both sides, that the husband and wife could not live together without the hazard of very bad consequences: there had, also, been proceedings in the Spiritual Court; the decree established the agreement, with the reasons for so doing, and directed a settlement to be made upon the wife in performance of it. That case [*619] had an ingredient in it, which this had not, for *it proceeded upon a great deal of evidence of circumstances, and upon the ground that the agreement had put an end to the suit in the Ecclesiastical Court. *Lister's case*, 8 Mod. 22, *Strange*, 478, was a case at law, upon an *habeas corpus*, where the Court refused to deliver back the wife to the husband, and there is another case of a like nature in 1 Burrow's Reports, *Rex v. Mead*, 452. *Fitzer v. Fitzer*, 2 Atk. 511, was a bill brought against the husband and his creditors, and Lord Hardwicke goes upon this ground, that with respect to creditors, such an agreement being voluntary, could not prevail though good against the husband, upon the authority of *Engier v. Engier*, and *Seeling v. Crawley*: and his Lordship observed, that if he was to enforce it, as against the creditors, it would be encouraging insolvent parties to execute such agreements, by way of avoiding payment of their debts. So in *Stephens v. Olive* (ante, vol. ii. p. 90), one of the points was, whether the agreement was good against the creditors, and Kenyon, in citing *Fitzer v. Fitzer*, observes, that it was not so in that case, because there was no valuable consideration on the part of the wife; but held it good in *Stephens v. Olive*, considering that the circumstance of the property being invested in trustees, and they bound to maintain the wife, rendered it a valuable consideration, so as to support it against creditors. *Head v. Head*, 1 Vesey, 17, but more accurately reported in 3 Atk. 547, (5) has been said to completely decide the present case, and establish this principle, that if the husband offers to take the wife home, the Court must comply and annul the agreement: the question was, whether the letter, which is accurately stated in Atkyns, amounted to an agreement for a perpetual separation, or merely a temporary one; and it was clear, from the language of it, that it meant only the latter; Lord Hardwicke seems to have been anxious to have enforced it, if he could have done so with propriety, and he decides the case purely upon the ground of its being a mere temporary agreement, and that the parties must apply to the Ecclesiastical Court; (5) that authority cannot decide this case; since, if it had been a perpetual agreement, the Court would doubtless have enforced it. *Fletcher v. Fletcher*, † (6) November 20th, 1788, has also been [*620] adverted to; the learned judge was perfectly clear * that, in all cases where the contract was a proper one, this Court will enforce

(†) *Fletcher v. Fletcher* (6), the plaintiff, the wife of the defendant, filed her bill against her husband and trustees for a specific performance of articles of separation: the defendant, the husband, filed his cross-bill for the delivery up of the articles, and praying that the same might be cancelled: the plaintiff having, as proved in the cause, returned to her husband, and cohabited with him for fourteen days, and there being some other strong collateral circumstances in evidence, in favor of the defendant.

Mr. J. Buller, sitting for Lord Chancellor, refused to decree a performance, and dismissed the original bill; and, upon the cross-bill, ordered the deed to be delivered up; no costs on either side.

(5) And likewise from Reg. Lib. Supplement to Vesey, p. 18.

(6) S. C. 2 Cox, 99. Quod vide.

it, and would have done so in that instance, had there not been a subsequent cohabitation.

After these authorities, independent of any other circumstances, and without proof, the question nakedly comes before me, whether I ought not to enforce this agreement; and I am of opinion, that I am bound by the cases to do so. It has been suggested, that there are authorities where the parties, after such a contract, have applied to the Spiritual Court for a restitution of conjugal rights: and that there is the case of *Booth v. Booth*, in the latter part of Lord Hardwicke's time, which came before the Court upon an injunction to restrain the proceedings in the Spiritual Court; but what became of that matter, I have not been able to trace; what would be the event of such an application, it is not necessary for me now to decide. The objection, which remains to be considered, is, that if the Court does enforce such a contract, the peculiar situation of the defendant, as having been an insolvent man, does not warrant a specific performance of it in the present instance, at least, to its utmost extent, and that the plaintiff ought to rest satisfied with the 40*l.* per annum. But I am of opinion, that, if it is performed, it must be *in toto*, and that it cannot be executed only in part. This is the contract of the husband to maintain the child as well as the wife, and he must abide by it; and so long as she complies with the conditions of it and keeps the child, she must receive the 100*l.* per annum; (7) therefore, let it be referred to the Master, to take an account of what is due for the arrears of the annuity from the date of the receipt, and let the same be paid, together with the growing payments, to her, or such person as she shall appoint, and the defendant to pay the costs. (a)

(7) His Honor declared, that "the agreement between the parties ought to be specifically performed and carried into execution:" and referred it to the Master, &c. (ut supra). — R. L.

(a) "If the separation of the wife from her husband be voluntary on her part, and is caused by no cruelty or ill-treatment; or if he is, *bona fide*, ready and willing and able to maintain her, and she, without good cause, chooses to remain separate from him; or if she already has a competent maintenance; in all such cases, courts of equity will afford her no aid whatever in accomplishing a purpose, which is deemed subversive of the true policy of the matrimonial law, and destructive of the best interests of society." 2 Story, Eq. Jur. ch. 37, § 1426; Clancy on Rights of Women, B. 6, ch. 9, p. 560, 561; Ib. ch. 10, p. 572, 573; 2 Roper on Hush. and Wife, ch. 22, § 5, p. 313 to 322. "So earnest are courts of equity to promote the reconciliation of parties living in a state of separation, that they will, on no occasion whatever, enforce articles of separation by decreeing a continuance of the separation. *Wilkes v. Wilkes*, 2 Dick. 791; *Worrall v. Jacob*, 3 Meriv. 267; *Westmeath v. Westmeath*, Jacob. 126; S. C. 1 Dow, 519 (N. S.); *The People v. Mercien*, 8 Paige, 47, 57; *M'Kennan v. Phillips*, 6 Whart. 571.

"It has, indeed, been often questioned, whether deeds of separation between husband and wife, through the intervention of trustees, ought not to be held utterly void to all intents and purposes, as against the policy of the law, not only in their direct provisions for the separation, but also in respect to all collateral and accessorial provisions, such as a stipulation for a separate maintenance. See *Westmeath v. Salisbury*, 5 Bligh (N. S.), 356; S. C. 1 Dow & Clarke, 519; *Evans v. Evans*, 1 Hag. Consist. 36.

"But the authorities on this subject, have, perhaps, gone too far to enable courts of equity to adopt this broad principle, even if it were as unquestionable and salutary in morals and policy, as it has been thought to be. *St. John v. St. John*, 11 Ves. 529, &c." 2 Story, Eq. Jur. ch. 37, § 1426, 1427, and notes and cases cited; *Carson v. Murray*, 3 Paige, 483.

A contract between husband and wife for separation being against public policy, should not be enforced in Chancery on her bill for that purpose. *M'Crocklin v. M'Crocklin*, 2 B. Monroe, 370. See also *M'Kennan v. Phillips*, 6 Whart. 571; *Elworthy v. Bird*, 2 Sim. & Stu. 371; *Rogers v. Rogers*, 4 Paige, 516.

Reconciliation does away with articles of separation. *Heyer v. Burger*, 1 Hoff. 1. What intercourse, between a man and wife, who have been separated, would amount to a reconciliation, is discussed in the above case. 1 Hoff. 1; *Carson v. Murray*, 3 Paige, 483; *Westmeath v. Salisbury*, 5 Bligh (N. S.), 339.

[As in the Spiritual Court, upon a separation, a *mensa et thoro propter scævitiā aut adulterium*, after a reconciliation, the same cause of complaint cannot be revived; so after a separation upon articles, if the parties once come together again there is a complete end of

them. *Fletcher v. Fletcher*, cit. sup. *Lord St. John v. Lady St. John*, cit. sup. ; *Bateman v. Countess of Ross*, 1 Dow. P. C. 235. — *Eden*.]

To preserve the public peace and morals, and upon the principle of a stronger policy overruling a weaker one, a separation of husband and wife may be allowed. *Helms v. Francisus*, 2 Bland. 545. See further, on this subject, *Jelineau v. Jelineau*, 2 Desaus. 45 ; *Anon.* ib. 199.

[As to a covenant from the trustees in a deed of separation to indemnify the husband against debts contracted by the wife after the separation, being a valuable consideration as against creditors, vide *Stephens v. Olive*, ante, vol. ii. 90, and the notes. — *Eden*.]

[*621]

*SMALLMAN v. ONIONS and Others.

Lincoln's-Inn-Hall, 25th May.

(Reg. Lib. 1791. B. fol. 201. b.)

Injunction to stay waste refused, where the plaintiff and the defendant in possession were tenants in common, (1) but granted on affidavit of defendant's insolvency. (2)

MR. ABBOT moved for an injunction to restrain the defendants from felling or cutting down any more timber or other trees, or committing further waste on the premises in the bill mentioned, upon affidavits of title, and of waste committed.

By the bill and that part of the affidavits which went to the plaintiff's title, it appeared that Lucius Henry Hibbins, L.L. D. being seised in fee of the premises, devised the same to his wife and two other persons, as trustees, to sell the same, and out of the money to be produced by the sale, to pay off incumbrances on the estate, then to his wife for life, and after her decease to pay certain legacies, and to divide the rest of the money into three parts, and to pay and apply them as follows : that is to say, two parts of the said three parts to his son Frederick George (whom he called his unhappy fugitive son), if living, or if dead, to his children lawfully begotten, but if he be dead without lawful issue, then to such of his relations as his wife, by her last will, should have appointed to receive the same on such a contingency ; and for want of such appointment, then to his niece Lucretia, daughter of his brother Hibbins ; and as to the other third part of the said money, to pay the interest thereof to his daughter Henrietta Lucretia, for her sole and separate use, and out of the power of her husband ; and after his decease, if she should happen to survive him, to pay the money to the said Henrietta Lucretia, her executors, &c., provided the said executors, &c., were not of the blood of her husband ; and if his said wife should die before her said husband, then to pay the said three parts to such of the testator's relations as his said wife should appoint to receive the same : and for want of such appointment, to the children of John Onions ————, share and share alike, and made his wife executrix. Elizabeth Hibbins, the widow of the testator, entered into possession of the estate, and made her will, dated 23d November, 1759, and thereby directed, that in case her husband's son, Frederick George, was dead without issue, the trustees should pay his two thirds to Henrietta Lucretia (in certain events), remainder to Lucretia, daughter of the said Lucius Hibbins, her executors, [*622] administrators, and assigns : Elizabeth *Hibbins died soon after the

(1) *S. P. Goodwyn v. Spray*, 2 Dick. 667.

(2) Or against acts amounting to destruction. *Hole v. Thomas*, 7 Ves. 599. See also in *Twort v. Twort*, 16 Ves. 128, &c. in which an injunction was granted, inasmuch as one of the parties had placed himself in the situation of tenant to the other.

making of the will, Henrietta Lucretia being then dead, without issue: Frederick George, son of Lucius Hibbins, about forty years ago, went abroad, and had never returned to England, and therefore the deponent swore he verily believed that he was dead, without issue. The plaintiffs, Robert Smallman, and Lucretia Smallman, are the son and daughter of Lucretia, the daughter of the testator, and as such entitled, in the events that have happened, to the money to arise from the sale of the premises.

The premises had not been sold, but John Onions, junior, who was entitled to the other third, as the son of John Onions, upon the event of the death of Henrietta Lucretia, entered, upon the death of Elizabeth Hibbins, into the whole of the premises, and had continued ever since in possession, without paying any rent to the plaintiffs, and plaintiff Robert Smallman, who made the affidavit, swore that, being informed that part of the timber had been agreed by Onions to be sold, he made an entry upon the premises, and then found that the timber had been sold by the defendant Onions to the other defendants, Massey and Lewis, whose agents were then cutting the timber.

In a further affidavit, the plaintiff Smallman swore, that he had applied to the defendants, Massey and Lewis, that two thirds of the purchase-money of the said timber might be paid into Court, to the credit of the cause, and not paid over to the defendant Onions; which they refused, and said they should pay the money to the defendant Onions; and the plaintiff further swore, that if the purchase-money for the timber so purchased by the defendants Massey, and Lewis, should be paid to the said defendant Onions, the same will not be safe in his hands, as the deponent conceives the said John Onions is not of ability to answer the amount of the said two thirds of the purchase-money of the timber, and two thirds of the rents and profits of the premises.

Lord CHANCELLOR said, he had no idea of an injunction to stay waste in such a case as this, where the persons applying for the injunction are tenants in common with the person in possession, who has therefore an equal title to the possession with them, *although they [*623] might have a partition against him: and referred to a case in 1786. (3)

Mr. Abbot argued, that they were only equitable tenants in common, the legal estate being in the surviving trustee; that, therefore, the person who was committing the waste has no title to the possession, and cutting the timber is a trespass upon the trustees; and the affidavit states, that the party is insolvent, and cannot pay the plaintiffs their shares of the money to be produced by the sale.

And upon this ground the Lord Chancellor granted the injunction. (a)

(3) Goodwyn v. Spray, 2 Dick. 667.

(a) Eden on Injunct. (2d Am. ed.) 210-212. An injunction to stay waste between tenants in common lies in special cases. Hawley v. Clowes, 2 John. Ch. 122; Durham & Sunderland R. R. Co. v. Warren, 3 Beavan, 119; S. C. 2 Nich. H. & C. 393.

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*TRINITY TERM.

32 Geo. 3. 1792.

ELMSLIE and Others v. M'AULAY and Others.

[Rolls, 9th, 15th, 20th, and 24th May,] 1st June.

(Reg. Lib. 1791. A. fol. 307.)

Creditors of A. cannot maintain a bill against the representatives of B. to a part of the residue of whose estate A. is entitled. (1)

THE plaintiffs were creditors of John Ogilvy, who died 10th of April, 1788, having made his will, and appointed his widow, Jane Ogilvy, one of the defendants, sole executrix, who had proved the same; the plaintiffs filed a bill against her, as executrix of her husband, for an account of his estate, to which she put in her answer: and the cause coming on before his Honor, it was ordered to be referred to the Master, to take an account of the testator's estate, with usual directions. Before the account taken, or further order made, the plaintiffs filed the present bill against the defendants M'Aulay, as executor of Patrick Ogilvy, brother of the said John Ogilvy, Jane the widow, the other executors of the brother, and other persons interested in the distribution of his (Patrick Ogilvy, the brother's) estate, and the bank, stating the former bill, and that the assets of John Ogilvy, possessed by the defendant, his widow, were not sufficient to satisfy his debts, and that the plaintiff had, since the filing their bill, discovered that Patrick Ogilvy, the brother of John, had made his will, dated 24th August, 1782, and had thereby directed "the residue of his property to be put into the funds of the Bank security, the interest to be paid to his father, and after his decease, the money funded, to be divided into three equal parts, one part thereof to be paid to his loved brother John Ogilvy," the other thirds to other persons who were made defendants, and appointed the defendants, M'Aulay Campbel, and his brother John Ogilvy, executors; that Patrick Ogilvy died, soon after making the will, and that John Ogilvy and Campbel proved the same; that Campbel had proceeded to [*625] collect certain *parts of the estate of Patrick Ogilvy abroad, which he had remitted to the defendant M'Aulay, who, though he had not proved the will, had collected effects in England, and had received the same, together with the effects remitted by Campbel; the bill further stated that the defendant Jane, the widow of John Ogilvy, had refused to join the plaintiffs in this suit, or to take measures to compel the defendant M'Aulay to lay out the testator's property in his hands, upon the trusts of the will; and that the plaintiffs had reason to believe, that unless the property of testator Patrick Ogilvy, in the hands of defendants M'Aulay and Campbel, is laid out according to the directions in Patrick Ogilvy's

(1) Vide etiam, *Utterson v. Mair*, postea, 4 vol. 270, and S. C. 2 Ves. jun. 95. There are, however, some proper exceptions to this rule; such as, where there is collusion between the parties, insolvency, &c. Vide *Newland v. Champion*, 1 Ves. 105; *Taylor v. Allen*, 2 Atk. 213; *Alsager v. Rowley*, 6 Ves. 749, et seq., per Lord Eldon, C. etiam 9 Ves. 86, 87; *Burroughs v. Elton*, 11 Ves. 29, &c. { See the cases cited in note (a) to *Eden on Injunct.* (2d ed.) 384; *Holland v. Prior*, 1 Mylne & Keen, 240; *Story*, Eq. Pl. ch. 4, § 178, and notes; *Coop. Eq. Pl.* 176; *Mitford*, Eq. Pl. by Jeremy, 158; *Long v. Majestree*, 1 Johns. Ch. 305; *Story*, Eq. Pl. ch. 10, § 514; 1 *Story*, Eq. Jur. ch. 7, § 423; ch. 9, § 581; *Utterson v. Mair*, 2 Ves. jun. 95, *Hovenden's note*, 1 Supp. 231, 232. }

will, the same would be endangered; and, as the assets of John Ogilvy are insufficient to pay the plaintiffs and other creditors their debts, without applying his interest under Patrick Ogilvy's will for that purpose, they had applied to defendant Jane, to require the defendant M'Aulay to come to an account of the property of Patrick Ogilvy which has come to his hands, and to request him to invest the same as directed by the testator's will, for the benefit of the persons now interested in the same, or who will become entitled to receive the same, according to their respective interests, after the decease of the defendant Malcolm Ogilvy, the testator's father.

The bill therefore prayed an account of the personal estate of Patrick Ogilvy, come to the hands of the defendant M'Aulay, or others of the defendants: and that, after payment of testator's debts, &c., the residue might be invested in some of the public funds, the interest paid to the defendant, Malcolm Ogilvy, for life: that two third parts might be declared to belong to the persons to whom the same were given by testator's will, and the remaining third part to John Ogilvy deceased; and that the said John Ogilvy's third part may be decreed toward the payment and discharge of the plaintiff's and his other creditors' just debts, &c.

The defendant, Jane Ogilvy (widow of John Ogilvy), by answer, denied that she ever refused to join with the plaintiffs in his suit, or to take other measures to compel the defendant, M'Aulay, to lay out and invest the testator, Patrick Ogilvy's property, on the trusts of his will, she never having been applied to, or requested by the plaintiffs to join them in this suit.

*At the hearing of the cause, His Honor had thrown out great [*626] doubts whether the creditor of A. could maintain a bill against the possessors of the assets of B. in which A. was interested. (2)

His Honor this day pronounced judgment.

Master of the Rolls.

My only doubt has been, whether this was a case to dismiss the bill with costs; and I think I should not do justice to the parties if I did not dismiss it with costs.

It is a bill by the creditors of John Ogilvy, against persons having assets of Patrick Ogilvy.

The first bill was against Mrs. Ogilvy, the executrix of John Ogilvy, for an account of his estate. On the hearing, the usual accounts were directed.

Before any account taken, the creditors filed this bill against Mrs. Ogilvy, the executrix, the residuary legatees of Patrick Ogilvy, and other persons interested in his estate.

The question is, whether the Court will permit such a bill to be filed. The consequence of it would be, that it would be competent to any simple creditor of John to file a bill against the representatives of Patrick: if John was one of the residuary legatees of Patrick, so might Patrick be of some other estate, which the creditor of John might as well follow.

It is impossible to maintain such a bill, except in the case where there is a collusion of the executrix with the person who is possessed of the fund; that made out or proved might support such a bill.

Here they should have made a special application to be let in before the Master, and have desired that she might be directed to pursue the effects

(2) The cause came before the Court on four several days previously to the judgment. — R. L.

of Patrick, or that they might be permitted to use her name in a suit for that purpose.

[*627] *All collusion is denied by the answer, and none is proved; then can such a bill be supported? It would be a monstrous proposition for me to lay down. She has sworn she never was called upon to pursue the effects of Patrick till after the bill filed.

Another objection to such a bill is, that if it were maintainable by every single creditor upon the fund, so it would be against every individual debtor to the fund, which would load the records of the Court with an infinite number of expensive suits. (a)

Bill dismissed with costs.

(a) See *Holland v. Prior*, 1 Mylne & Keen, 240; *Story*, Eq. Pl. ch. 4, § 178; ch. 10, § 514.

[The general principle has been established by a great variety of decisions, that a debtor to the estate cannot be made a defendant to a bill by a creditor or residuary legatee against the executor, unless there be collusion, { 1 *Story*, Eq. Jur. ch. 7, § 423, } insolvency, or some special case. *Newland v. Champion*, 1 Ves. 108; *Beckley v. Dorrington*, cit. 6 Ves. 749; *Franklyn v. Ferne*, *Barnard. Ch. Rep.* 30; *Utterson v. Mair*, post, vol. iv. 270; 2 Ves. jun. 95; *Bowser v. Hughes*, 1 Anst. 101; *Doran v. Simpson*, 4 Ves. 651; *Troughton v. Binkes*, 6 Ves. 572; *Alsager v. Rowley*, ib. 749; *Benfield v. Solomons*, 9 Ves. 77; *Saxton v. Davis*, 18 Ves. 72; *S. C.* 1 Rose, 70; *Tulk v. Houlditch*, 1 Ves. & Bea. 248. In *Burroughs v. Elton*, 11 Ves. 29, a judgment creditor was permitted to sue; the circumstance of the heir and personal representative of the debtor being unable or unwilling to sue, being considered such a special case as to take it out of the general rule. — *Eden*.]

MINOR and Others v. WICKSTEED and Others.

(Reg. Lib. 1791. B. fol. 409. b.)

Where there is a charge in the will of legacies upon real estate, they shall be so charged, though they are first directed to be paid out of the residue of the personalty, the personal fund proving deficient.

JOHN RAVENSHAW, seised of real, and possessed of some personal estate, made his will, dated 13th February, 1783, as follows: "1st. I direct that all my debts and funeral expenses shall be discharged by and out of my personal estate (not hereinafter specifically bequeathed): also, I bequeath to my loving wife, Susannah Ravenshaw, all my provisions of household wines, malt, and other liquors, coals, and fuel, that shall be in or near the dwelling-house wherein I do or shall inhabit at my death, or the buildings and folds thereunto belonging, every or any of them, to be delivered to her immediately after my decease; and also the sum of twenty guineas, to be paid within one month, for her present subsistence: also, I give the use of all my household goods, furniture, plate, china, linen, books, and dairy vessels whatsoever (which I exempt from the payment of my funeral expenses and legacies), unto my said wife Susannah, for and during her natural life; and from and after her decease, then I give the use of the said goods, &c. unto my said wife's niece, Felicia Griffith, widow, for and during her life: and after the decease of the survivor of my said wife, and the said Felicia Griffith, I will that the said goods, &c. shall be deemed and taken to be part of the residue of my personal estate hereinafter disposed of: also I give to my said wife's niece, Hannah Davies, five guineas, to be paid six months after my death; also I [*628] devise all my *estate, and interest of and in those two several pieces and parcels of land or ground lying in Whitchurch afore-

said, called Edges Croft and the Black Lakes, unto my said wife, Susannah Ravenshaw, her heirs and assigns; also, I devise all and singular other my messuages, tenements, lands, hereditaments, and real estates whatsoever, with their appurtenances, unto my said wife Susannah Ravenshaw, and her assigns, for and during the term of her natural life; remainder to Felicia Griffith for life; and from and immediately after her decease, then I devise all the said last hereinbefore-mentioned messuages, lands, tenements, hereditaments, and real estates, with their appurtenances, subject to and charged and chargeable with the payment of such of my debts, funeral expenses, and legacies, as that part of my personal estate, which is herein made liable thereto, shall not reach, to pay unto John Wicksteed, of Whitchurch aforesaid, surgeon, his heirs and assigns forever: also, I give to my sister, Mary Allen, the weekly sum of 2s. 6d. from my death, for the term of her natural life, the first payment thereof to be made at the end of seven days next after my death; and I do charge my personal estate with the payment thereof accordingly: also, I will, order, and direct, that the said John Wicksteed and William Minor, my executors, hereinafter named, do and shall, from time to time, after my death, for and during the natural lives of my said wife and the said Felicia Griffith, and the natural life of the longer liver of them, place out at interest, upon good real, personal, or government securities, at their discretion, all the overplus of my personal estate, after payment of my debts and legacies aforesaid, funeral and other expenses incident to this my will, upon the several trusts following; that is to say, upon trust to permit and suffer my said loving wife and her assigns, to have and receive; and I do hereby give to her the annual interest and proceeds of my personal estate, for and during her natural life; and in case the said Felicia Griffith shall happen to survive my said wife, then in trust, to permit and suffer the said Felicia Griffith, and her assigns, to receive and take, and I do hereby give to her accordingly, the interest and yearly produce of the said overplus of my said personal estate, for and during her life; and as to the said overplus of my said personal estates, from and after the decease of the survivor of my said wife, and the said Felicia Griffith, I dispose thereof in manner following; that is to say, I give to my niece, Catharine Ravenshaw, if she be living at the time of the decease of the survivor of
*my said wife, and the said Felicia Griffith, the sum of 1000*l*.; [*629] also, to my niece, Elizabeth Ravenshaw, and my grand-niece, Elizabeth Ravenshaw, the sum of 50*l*. each: also, I bequeath to William Minor, of Hopley, in the parish of Hadnel, in the county of Salop, yeoman, the sum of 500*l*.; and I will, that the said four last legacies shall be paid within the space of six months next after the death of the survivor of my said wife and the said Felicia Griffith: also, I give and bequeath all the residue and remainder of the said overplus of my personal estate and effects whatsoever (after and liable to the payment of the legacies hereinbefore bequeathed) unto the said John Wicksteed, to and for his own use," and appointed his wife, the said John Wicksteed, and William Minor, executors.

The testator died soon after making his will, without revoking or altering the same, leaving the executors, and James Goldesborough Ravenshaw, his heir-at-law, him surviving; and the executors proved the will; but Susannah Ravenshaw, the widow, and John Wicksteed, alone acted in the execution thereof. John Wicksteed died soon after the testator, leaving the defendant, William Wicksteed, his brother and heir-at-law, who, as such, became entitled to such part of the testator's real estate, as was de-

vised to John, subject as aforesaid, and who also took out administration to him, and thereby became his legal personal representative. Susannah Ravenshaw also died, having made her will, and appointed the defendant, Hannah Davies, her executrix. John Wicksteed and Susannah Ravenshaw, both dying in the lifetime of William Minor, he became the surviving executor of the testator. He died in the lifetime of Felicia Griffith, and the plaintiffs are his executors, and have proved his will.

Upon the death of Felicia Griffith, the defendant Wicksteed entered into possession of the real estate devised to her for life, with remainder to John Wicksteed.

Felicia Griffith died 29th May, 1788; whereupon the legacy of 500*l.* became payable, with interest, from the end of six months after her decease; and the plaintiff, after the expiration of the six months, filed the present bill for the same.

[*630] * The personal estate of the testator proving deficient, the only question was, whether this amounted to a charge on the real estate.

Mr. *Solicitor-General*, and Mr. *Lloyd*, for the defendants.

The object of the bill is, to have this sum of 500*l.* raised out of the real estate; but it cannot be considered as a charge, but merely as a sum to be raised out of the residue of the personal estate.

Mr. *Mitford*, for the plaintiffs. The construction of the will must be absurd, if this is not considered as a charge upon the real estate. He gives his household goods, &c. to his wife for life, then to Felicia Griffith for life, then to be part of the residue of his personal estate. He gives two small legacies, one to his wife of twenty guineas, another to her niece of five guineas, which are the only sums he means to be paid during the lives of his wife and Felicia Griffith. Then, in the disposal of his real estate, to his wife for life, remainder to Felicia Griffith for life, remainder to Wicksteed in fee; in that part he has made a general charge of debts and legacies, upon the supposition, that his personal estate may be insufficient. He then disposes of the overplus of his personalty. I submit, on the consideration of the whole will, there is a manifest intent to give the real and personal estate (subject to the lives of his wife and Felicia), charged with debts and legacies. During the life of the two tenants for life, there is no charge, no legacies are to be paid till after their death. The matter in contemplation of the testator must have been, to exempt the personal estate from payment of legacies during their lives. Then, with respect to the charge, it is absurd to suppose he thought the personal estate would be deficient as to the small legacies preceding the charge, and therefore charged the real; and that he had not the same intention with respect to the large ones. There are no words to control the charge to the first legacies, no such words "as the legacies aforesaid," and the latter words are not such as to control the former. The whole argument is, that he meant the four legacies to come out of the surplus; but he calls them legacies; they were clearly payable out of the surplus, if sufficient, but were, otherwise, charged on the real.

[*631] *Mr. *Lloyd*, for the defendant. It is almost impossible to say, that these were to take place as legacies, they were part of the residuary personal estate. The word *legacies* is satisfied by the two first legacies of twenty guineas and five guineas. He did not mean the legatee to be in a better situation than the wife, or Mrs. Griffith. Neither of them could have exonerated the personal estate by charging the real. A residuary legatee cannot have assets marshalled, as a legatee or mortgagee may. The word "legacies" can only mean sums, part of my personal estate, for they are expressly to be paid by Wicksteed, out of the personal estate.

Suppose, instead of there being no personalty, there had been a small residue of 100*l.* or 200*l.*, the tenants for life would have been entitled to that residue for life; could Minor have called for it to be made up out of the real estate, to the amount of his legacy? If the residue would not pay 500*l.* he could not call for it.

Mr. *Solicitor-General* submitted, that the fund was to be distributed at the death of the tenant for life.

LORD CHANCELLOR. It struck me at first, as being only the gift of a residue; but, upon considering the whole frame of the will, I think the testator treats it as a fund to result, and then to vest in Wicksteed, and to be distributed by him; who would, at the same time, take the real estate in fee. The testator thought the two first legacies would never fall upon the real estate. It is true, that a real estate shall never come in aid of a residue; but when it is a new resulting fund, it is different. (a) I think, here, the only residue is that given to Wicksteed, after the death of the tenants for life; and that the 1000*l.* and 500*l.* must be raised out of the real estate, which must be decreed to be liable to the raising of it. What confirms this construction is, that the first legacies are so small, that it is impossible to suppose that he should think the personal estate would not pay them, and therefore give the real estate to satisfy them, and not make the same provision for the larger ones. (1)

(1) After directing the usual accounts relative to the personal estate and due application thereof, in payment of the debts, funeral expenses, legacies, and arrears of annuities, the Court declared, that in case it should not be sufficient to pay the several legacies, of 1000*l.*, 500*l.*, and 50*l.*, charged on the estate devised to the late F. G. for her life, that the deficiency of such personal estate to pay the same, and also the interest thereof, ought to be raised and made good out of the said estate so devised as aforesaid, and decreed accordingly. — R. L.

(a) See *Ram on Assets*, ch. 6, § 1, p. 86, 87; *ib.* ch. 6, § 15, p. 130, 131.

*HENDERSON v. HAY.

[*632]

(Reg. Lib. 1791. A. fol. 337.)

Covenant not to assign without license, does not come within a contract to grant a lease with common and usual covenants. (a)

HENDERSON, the plaintiff, being assignee of a lease of a public house, without any covenant restrictive of alienation without license, by his agent,

(a) It having been affirmed in argument, that this was merely an opinion, and not the judgment of Lord Thurlow, the Register's book was searched to ascertain that fact (15 Ves. 271), from whence it appears, that it was a declaration in judgment upon the very point. Considerable difference of opinion has existed upon the subject; Lord Kenyon, in a case at Nisi Prius, *Morgan v. Slaughter*, 1 Esp. N. P. C. 8, having ruled that such a covenant was a fair and usual covenant, and that opinion was followed (in preference to Lord Thurlow's in the present case), in *Folkingham v. Croft*, 3 Anst. 700.

The point afterwards came on before Sir W. Grant, in three cases, *Vere v. Loveden*, 12 Ves. 179; *Jones v. Jones*, *ib.* 186, and *Browne v. Raban*, 15 Ves. 528, in which his Honor considered himself bound by the authorities of Lord Kenyon and the Court of Exchequer, though he observed that if no decision had arisen subsequent to the present case, he should have been inclined to think, with Lord Thurlow, that the meaning is incidental covenants, not collateral covenants, which it might be very wise to impose, and to which many tenants would not object, but which ought to be the subject of treaty and separate agreement, not necessarily flowing from the agreement to let and take.

The point afterwards came before Lord Eldon, in the case of *Church v. Brown*, 15 Ves. 258, when his Lordship, after great deliberation and conference with Sir W. Grant, and after an elaborate and luminous review of the whole doctrine, came to the determination, that,

agreed with Hay, the owner of the land, for the grant of a lease of the same, with other premises, upon common and usual covenants. A lease was accordingly prepared, which the defendant approved, but the defendant's solicitor afterwards inserted two covenants, the one, that Henderson should not assign without license from the grantor; the other, that he should not build upon a skittle ground, adjoining the premises. The plaintiff filed the present bill for a specific performance of the former contract, by the grant of a lease without such restrictive covenants.

Mr. *Mansfield*, for the defendant, argued, that they were common and reasonable covenants, in the case of a public house; as, otherwise, the lessee might assign to persons of bad character, and endanger the license; and the covenant not to build was reasonable, as it might be injurious to other property of the defendant, which was contiguous.

The covenant, not to build, was not resisted.

Lord CHANCELLOR said, common and usual covenants must mean covenants incidental to the lease. (a) That though the covenant, not to assign without license, might be a very usual one, as he believed it was where a brewer or vintner let a public house, that would not make it a common covenant. (b)

It was referred to the Master, generally, to settle a proper lease, without any direction to omit the clause; but with a declaration that the defendant has no right to have a clause inserted restraining alienation without license. (1)

(1) The Court declared, "that the said defendant had not a right to insist on a clause to restrain the alienation of the said premises being inserted in such lease." The Court reserved the consideration of costs until after the Master's report. — R. L. See also per Lord Eldon C. 16 Ves. 271, 272.

under an agreement for a lease, the lessor was not entitled to such a covenant as a proper and usual covenant. His Lordship observed, that "the safest rule of property is, that a person shall be taken to grant the interest in an estate, which he proposes to convey, or the lease he proposes to make; and that nothing which flows out of that interest as an incident, is to be done away by loose expressions to be construed by facts more loose; that it is upon the party who has forborne to insert a covenant for his own benefit, to show his title to it, and that it is safer to require the lessor to protect himself by express stipulation, than for courts of equity to hold that contracting parties shall insert, not restraints expressed by the contract or implied by law, but such, more or less in number, as individual conveyancers shall from day to day prescribe, as proper to be imposed upon the lessee, and that all those restraints, so imposed from time to time, are to be introduced as the aggregate of the assignment." After this determination, the lessor, in the above case of *Browne v. Raban*, notwithstanding the opinion previously delivered, consented to grant a lease without that covenant, and the point may now be considered as settled upon the highest authority.

Where an assignment was with the usual and customary covenants of the neighborhood, it of course became necessary to inquire by a reference to the Master, whether a covenant not to assign was customary, &c. *Boardman v. Mostyn*, 6 Ves. 467. { *Hovenden's note*, 1 Supp. 615, 616. } So also, in the management of many great estates, the expression is familiar, such covenants as are usual in those estates; which, upon dispute, would also be matter of inquiry, as the lessee may either desire to be informed what are the covenants usually inserted in their leases, or may not inquire about them; concluding that, being submitted to by the tenants, they are reasonable, 15 Ves. 269. — *Eden*.

(a) See note (a) preceding page.

(b) If an agreement for a lease contains no stipulation as to covenants, the party agreeing to take the lease, has a right to a lease containing only usual covenants, and a restriction against particular trades, not being a usual covenant, cannot be introduced into the lease. *Proper v. Parker*, 3 My. & Keen, 280.

*The Earl of DELORAINE v. BROWNE and Others. [*633]

[June 13th.]

(Reg. Lib. 1791. B. fol. 465. Entered *Scott v. Browne.*)

Demurrer to a bill, charging fraud in a misrepresentation of the value of an estate to vendor, on the ground that the transaction was twenty-seven years old, and had been confirmed by a deed twenty-three years since, disallowed. (1)

THE bill stated, that in the year 1759, the plaintiff, then of the age of twenty-two years, was, under the will of his uncle Edward Duncombe, Esq., deceased, seised or entitled in tail male, subject to the estate for life of Susannah Duncombe, the widow of the said Edward Duncombe, who was then sixty-eight years of age and upwards, with remainder to plaintiff's brother, the Honorable John Scott in tail male, with the immediate remainder or reversion in fee-simple to plaintiff, of or to the manor of Holbeach, in the county of Lincoln, and other hereditaments therein, which were, and had been for thirty years before, let at rents amounting to the sum of 980*l.* a year, and also of or to the manors of Skerne and Wandisford, and divers messuages, &c. situate in Skerne and Wandisford, Middleton, and Great and Little Driffild, in the county of York; which were then, and had been for thirty years, let at rents amounting to 630*l.* a year. That the plaintiff being, in the said year, 1759, greatly distressed for money, he informed Thomas Browne (defendant's father), a land surveyor, of the same, and employed him to put plaintiff's interest in the several estates, up to sale; and that Browne assured plaintiff, he knew of a

(1) It is to be observed, that it seems now to be considered as quite clear, that the statute of limitations, or objections in analogy to it upon the ground of laches, may be taken advantage of by way of demurrer, notwithstanding the decision of Lord Hardwicke, in *Gregor v. Molesworth*, 2 Ves. 109. If the plaintiff has any ground of exception to prevent the bar, or the presumption arising from length of time, then the bill should state it, and it would not be demurrable. See Lord Redesdale's Treat. p. 173, &c. (3d edit.); *Sherrington v. Smith*, Dom. Proc. 2 Bro. P. C. 62 (8vo. edit.); *Beckford v. Close*, stated 4 Ves. 476; *Foster v. Hodgson*, 19 Ves. 180, and further, per Lord Redesdale C. in *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 637, 638, &c. Lord Redesdale's remarks upon the principal case are so forcibly apposite, and so useful to a due consideration of the point in question, that it will require no apology for the Editor to give a transcript of them. In 2 Sch. & Lef. p. 637, his Lordship says:—

"In the case of *Lord Deloraine v. Browne*, an attempt was made to take advantage of the length of time by demurrer. The decision of that case, as reported by Brown, does not convey much satisfaction to my mind; and perhaps the note which follows will account for the judgment of the Court, being delivered somewhat in a hurry [namely, Lord Thurlow's resignation of the Great Seal]. The first judgment as reported is hardly intelligible, and then there is an explanation given the next day; it is, however, rather contrary to what Lord Kenyon determined at the Cockpit, in *Beckford v. Close*, which is cited in that case. This arose perhaps from Lord Thurlow's not having, under the peculiar circumstances in which he stood, sufficiently considered that this was matter of the law of a court of equity; that is, a rule which is to be considered as the law of a court of equity. Lord Kenyon held, that a demurrer to a bill, because it did not show a good title to redemption within twenty years, was a good demurrer. Why? Because it was the rule of the court, that no redemption should be allowed after twenty years; and therefore the party should be put to bring his case by his bill within that rule. Lord Thurlow's opinion was given in a hurry; and many cases were then pending in which much injury might have arisen to the parties if the judgment had not then been given; but it seems to me that Lord Kenyon's opinion is perfectly tenable on Lord Thurlow's own qualification; that is, that when a party does not by his bill bring himself within the rule of the court, the other party may by demurrer demand judgment whether he ought to be compelled to answer. If the case of the plaintiff as stated in the bill will not entitle him to a decree, the judgment of the court may be required by demurrer, whether the defendant ought to be compelled to answer the bill. That I take to be matter of the law of a court of equity, to be decided according to its rules and principles. However, it is clear, that in this case of *Lord Deloraine v. Browne*, Lord Thurlow was anxious that his overruling the demurrer should not be considered as deciding upon the case; and the cause never came on again, Lord Deloraine being advised that the length of time was a bar."

nobleman who would purchase plaintiff's interest, and asked him for a rental thereof; that plaintiff not being able to produce a rental, Browne said he would go down and survey the same; which he afterwards did, and represented to plaintiff that the value of his interest therein was worth something under 30,000*l.*, and plaintiff, confiding in that representation, agreed to take such sum for his interest therein; but Browne, afterwards, from time to time, pretended he could not get so large a price, and particularly insisted on plaintiff's not mentioning the affair to any person:

That Browne then took opportunities of suggesting that he could not get more than 24,000*l.* for plaintiff's interest; and that Browne entered into a treaty with the late Earl of Egremont, to sell to him plaintiff's interest for 24,000*l.*; who refused to treat further, from being satisfied that 24,000*l.* was not nearly the value of plaintiff's interest; that at length

Browne represented to plaintiff, that he could not procure any person to purchase plaintiff's interest in the estates, but intimated

his hope that he could procure a friend to purchase plaintiff's interest in the Lincolnshire estate, and that he might be able himself to purchase plaintiff's interest in the Yorkshire estate; and that he should endeavor to sell the Lincolnshire estate for 7000*l.*, and an annuity of 400*l.* for the life of plaintiff; and that he would give for the Yorkshire estate the gross sum of 1941*l.* 10*s.*, and an annuity of 600*l.* for the life of plaintiff; and proposed that 2000*l.*, part of the said sum of 7000*l.* and 1000*l.*, part of the 1941*l.* 10*s.*, should be paid to said John Scott, as a consideration for his joining plaintiff in levying fines of both estates, in order to bar the estate tail, and make a good title to the purchasers, subject to the life estate of said Susannah Duncombe; having advised plaintiff not to apply to said Susannah Duncombe to join in suffering a recovery of the estates, because he apprehended, if any such application was made, plaintiff might be informed of the value of the estates: and Browne represented to plaintiff, that the said sum of 7000*l.* and 1941*l.* 10*s.* and the annuities of 600*l.* and 400*l.* for the life of plaintiff, were equal in value to the sum of 24,000*l.* which plaintiff believed, as well as that 24,000*l.* was the full value of his interest in the estates; and that plaintiff acceded to the proposal, and permitted Browne to carry the same into execution as he should think fit; and Browne having procured one John Calcraft to purchase the Lincolnshire estates, they were conveyed to him and his heirs, subject to the life estate of Susannah Duncombe, and the plaintiff, and John Scott levied a fine of them:

That by indentures of lease and release, dated 17th and 18th June, 1760, in consideration of 1000*l.* paid to John Scott, in part of the gross sum of 1941*l.* 10*s.*, and also in consideration of 941*l.* 10*s.* the remainder thereof paid to plaintiff, and of an annuity of 600*l.* secured to be paid plaintiff for life, the Yorkshire estates were conveyed to trustees, in the first place, to secure the payment of the annuity; remainder to the use of Browne, his heirs and assigns forever: and the plaintiff and John Scott covenanted to levy a fine of the said premises; and which fine was afterwards levied:

That out of the moneys that plaintiff was to receive for the estate, Browne insisted upon retaining 1000*l.* for his agency and trouble, and did actually retain 500*l.* on that account:

[*635] *That the plaintiff not being relieved from his distresses by the money received, applied to Browne, to lend him money on the security of the annuities of 400*l.* and 600*l.*, who declined so doing, but referred plaintiff to Palmer, his attorney, to procure the loan he wanted,

who procured plaintiff the sum of 620*l.* upon an assignment of the annuity of 400*l.* for two years; and plaintiff charged, that the said 620*l.* was the proper money of Browne:

That continuing in distress, the plaintiff, about six months afterwards, requested Browne to lend him some money, who again referred him to Palmer, who procured him 700*l.*, in consideration of which, the plaintiff sold an annuity of 100*l.* part of the said annuity of 400*l.* to ———, a hosier, and the 700*l.* was the money of Calcraft, and the assignment of 100*l.* a year, was made in trust for him; so that although plaintiff had been persuaded, that the annuity of 400*l.* was worth sixteen years' purchase, when granted by the said John Calcraft, plaintiff was obliged to take from the said John Calcraft only seven years' purchase for the said 100*l.* a year payable out of the said 400*l.* a year.

That about the month of April, 1763, Susannah Duncombe died, and Browne took possession of the Yorkshire estate; and, soon after her decease, plaintiff received some imperfect information, that the value of the estates was greater than it had been represented to him by Browne, and for some time withheld the title-deeds from him and Calcraft, and informed Browne of what he had heard, who thereupon declared he had but roughly surveyed the estates when he went down for that purpose, but that he would go down again and survey the estates in a proper manner, and that if he should find he had been mistaken, plaintiff should instantly have the full value thereof.

That soon afterwards, Browne again surveyed the estates, and, upon his return, represented to plaintiff, that the full value of all the estates in possession was 40,000*l.*, but that plaintiff was bound by his bargain; however, that as Susannah Duncombe had died so soon, and they, the said Browne and Calcraft, had therefore made an advantageous bargain, they would, as a matter of compliment, give plaintiff the sum of 10,000*l.* if he would confirm the sale to them; and plaintiff not accepting the offer immediately, Browne employed severe threats of advertising plaintiff as a rogue, if he withheld the title-deeds from him and Calcraft, [636] and Calcraft used threats to the same purpose; by which plaintiff, being intimidated, and being greatly in want of money, he acceded to the terms proposed by Browne, and the title-deeds were delivered to Browne and Calcraft, but they alleged, that they could not pay plaintiff any more than the sum of 1500*l.* in cash, and Calcraft agreed to procure the re-assignment of the 100*l.* a year, which was accordingly reassigned, and Browne and Calcraft paid the plaintiff the sum of 1500*l.*; but, previous to the payment of the same, deeds were prepared by Browne's attorney, intended to operate as a confirmation, and by these deeds, bearing date 9th and 10th February, 1764, reciting the former indentures of lease and release of the 17th and 18th June, 1760, and that by the death of Susannah Duncombe, Browne had become entitled to the Yorkshire estates, subject to the annuity of 600*l.* to the plaintiff for life, and that Browne had accordingly been in the receipt of the rents and profits, from the decease of Susannah Duncombe, and had paid the annuity of 600*l.* to plaintiff, till the then Christmas last, and that, by the particular event of Susannah Duncombe's dying within so short a time after the contract, the same was become a very advantageous contract to said Browne, and that several of the deeds and writings relating to the title of the estate being in the hands of the personal representatives or agents of the said Susannah Duncombe, and they declining to deliver the same up without an express authority in writing from plaintiff so to do, therefore he had applied to plaintiff for

such order, and to join and concur with him (Browne), in pursuance of the covenant for further assurance, in doing all acts necessary for suffering a common recovery, wherein plaintiff might be vouched, of the said premises in the county of York, to the uses in the said indenture expressed, and that plaintiff had agreed thereto, upon Browne's paying to him the sum of 1500*l*. It was witnessed, that in pursuance of the contracts recited, and of the several sums paid, and for further securing the annuity, the said estates were conveyed to trustees to hold the same to the use and intent that plaintiff should receive for life the annuity of 600*l*., with proper powers of entry and distress for the same, and subject thereto, to the uses in the former indenture contained, and plaintiff released all claims and demands, except the annuity.

[*637] *That Browne, very soon after the execution of this last deed, raised the rents of the Yorkshire estate to about 1000*l*. a year, and it has been since let for above 1400*l*. a year, but neither Calcraft nor Browne ever paid to plaintiff, or to his use, any money on account of the 10,000*l*. so that the whole consideration paid by Browne, for the purchase of the said manors and estates in the county of York, was no more than the sum of 345*l*. 10*s*. inclusive of the said sum of 1500*l*. and an annuity of 600*l*. for the life of plaintiff, although the estates were, at the time of the execution of the said indentures of lease and release, worth, to be sold, at least, 30,000*l*. and the interest of plaintiff and his brother therein, in the year 1760, were, and were then known to Browne to be, worth 24,000*l*.

The bill therefore charged, that Browne was guilty of gross fraud towards plaintiff, and a manifest breach of the trust reposed in him, and that he was, in his lifetime, and his representatives now are liable to answer to plaintiff for the value of the Yorkshire estate, and of the plaintiff and his brother's interest in the estate which Browne prevailed on him to sell to Calcraft aforesaid, and which were worth at the time of the sale 35,000*l*., and that Browne received some premium or acknowledgment from Calcraft, for his assistance in the said purchase: and that Browne was, in his lifetime, and his representatives now are liable to answer to plaintiff, for the breach of trust of which Browne was guilty in that respect; at least, to answer for whatever benefit he received from Calcraft. And the bill stated frequent applications to Browne, for a reconveyance of the Yorkshire estate, or to pay the value thereof.

The bill further stated, that plaintiff, soon after the year 1764, was under the necessity, on account of his distresses, of residing abroad, and has altogether, since the year 1764, been in a state of such poverty, that he has not been able, until this time, to apply to any court for relief, touching the matters aforesaid, and has been obliged, on account of his distresses, to sell the annuity of 600*l*. which, or the greatest part thereof, has vested in the defendants, as executors of Browne, or in persons in trust for them.

It then stated, that Browne died in March, 1780, leaving the defendant [*638] William Browne, his only son and heir-at-law, and *having made a will and codicil (the dispositions of which the bill stated), and thereby appointed the defendants William Browne and Charles De Laet, executors thereof, who have proved the same, and it stated applications to the defendant William Browne, as heir, to reconvey the Yorkshire estate, upon plaintiff's making all due allowances.

The bill therefore prayed an account of rents and profits of the estate, &c. and of the annuity, and that so much as should appear on the balance to be due to plaintiff, should be paid to him, and the defendant Browne be

decreed to reconvey, or that plaintiff might receive out of the personal estate of the late Thomas Browne, satisfaction for the full value thereof, &c.

To this bill the defendants put in a general demurrer, and for cause, showed, that the plaintiff had not shown any title in equity, to call the defendants in question, touching the matters therein contained, and more especially it appears by the bill, that the last transactions sought to be impeached thereby, happened in the month of February, 1764, twenty-eight years before the filing plaintiff's bill, and plaintiff hath not by his bill shown any just cause why he hath not sooner instituted his suit, wherefore, &c.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *Campbell*, in support of the demurrer. The bill is filed to set aside a bargain made in the year 1760, and does not state that the plaintiff has made any discovery now, that he had not in 1764, when he confirmed the bargain. At present we must admit the facts stated to be true, for the purpose of arguing upon them; for though the demurrer admits they can be proved, it does not prevent their being met by argument: but if they were in proof, still there could be no relief at this length of time, although, if recent, there might have been relief. It is merely an equitable title, and it is a rule that an equitable title may be barred by time. If a party chooses to act on a bargain from 1760 till 1792, he ought not then to be permitted to impeach it. Browne lived from 1764, when the bargain was confirmed, till 1780, without any complaint of the bargain during that time. The plaintiff says, he was abroad, and in distress, but that distress did not prevent him from applying to Browne; he received 600*l.* a year, out of the effect of this contract. In respect to confirmation, it is *true that the party [*639] must be *sui juris*, and the confirmation must be an act of the same kind with the first transaction; but he surely cannot, after acquiescing twenty-eight years, come to impeach the contract. If that time will not be sufficient to bar, it does not appear that any length of time can do so; but it is certainly necessary some length of time should have such effect. It is true, the time is in the discretion of the Court; but the Court has governed that discretion by the practice of the courts of law, and has said, that, after twenty years, it will not give relief; as that is the time after which a court of law will not interfere. Thus, after twenty years, let the case be ever so strong, this Court will not permit a bill of review, as appears by the case of *Smith v. Clay*, Amb. 645,[†] which was a peti-

[†] *Smith v. Clay*, (2) 10th May, 1767. — The reporter having been favored with a more accurate note of Lord Camden's judgment in this case than has hitherto appeared in print, he flatters himself the publication of it will be acceptable to the profession, and has therefore inserted it here.

[Bill of review may be barred by delay of twenty years.] (3)

Lord Chancellor. — This bill of review is between thirty and forty years after the decree pronounced.

There is manifest error upon the face of the record.

The question upon this petition is, whether it is barred by length of time.

I am of opinion it is.

It would be an useless curiosity to trace backwards the origin of this proceeding.

It is at this time perfectly understood.

It is in nature of a writ of error, to reverse a decree, for error apparent upon the record.

This is the bill of review now before me, and to this my opinion shall be confined.

There are two questions.

First, What period of time is a bar to a bill of review?

(2) This note is from Lord Camden's own handwriting in his note-book. See per Lord Redesdale C. 2 Scho. & Lefroy, 630, 631. Et vide per Lord Manners C. 1 Ball. & Beatt. 71, 169, and in *Chalmer v. Bradley*, Jacob & Walk. 51, et seq.

(3) Vide etiam S. P. on demurrer, in Dom. Proc. *Sherrington v. Smith*, 2 Bro. P. C. 62, octavo edit. { *Story*, Eq. Pl. ch. 3, § 410; *Lytton v. Lytton*, 4 Bro. C. C. 441. }

[*640] tion for a *bill of review, upon error on the record; Lord Camden said, "This bill of review is like a writ of error to reverse a

Second, From what time this period shall be computed?

To the first question, the answer here is easy.

Twenty years is the period.

Edwards v. Carrol (5 Bro. P. C. 466), is decisive, and not now open to argument.

A court of equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party slept upon his right, and acquiesced for a great length of time.

Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.

Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this Court.

Therefore, in Fitter v. Lord Macclesfield, Lord North said, rightly, that though there was no limitation to a bill of review, yet, after twenty-two years, he would not reverse a decree but upon very apparent error.

"*Expediit reipublicæ ut sit finis litium*," is a maxim that has prevailed in this Court in all times, without the help of an act of Parliament.

But, as the Court has no legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year; it was governed by circumstances.

But as often as Parliament had limited the time of actions and remedies to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity.

For when the legislature had fixed the time at law, it would have been preposterous for equity (which, by its own proper authority, always maintained a limitation) to countenance laches beyond the period that law had been confined to by Parliament.

And therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar.

Thus, the account of rents and profits, in a common case, shall not be carried beyond six years.

Nor shall redemption be allowed after twenty years' possession in a mortgagee.

Jenner and Tracey, 1731. (Marginal notes on 3 Will. 287.)

Same thing in Belch v. Harvey (ubi supra), adding, that the statute, having given ten years after disability, that ought to be observed.

By the like analogy, the House, in Edwards v. Carrol, determined that twenty years should bar a bill of review, because the statute of Wil. 3, had barred all writs of error after that period.

I have said too much perhaps upon this point, which is now settled; but the grounds of that decision may, perhaps, be useful in deciding the next point;

Which is, whether this twenty years is to be computed from the time the decree is pronounced, or from the actual enrollment.

For the petitioners contend, that you must compute your time from thence.

If that should be the rule, the limitation would be more unsettled since the act of Parliament, than it was before.

For, as the time of enrolling is uncertain, the bill of review would be left open, or concluded, according to that event.

Thirty years would be a bar in one case, and three hundred in another; and if thirty years, in the present case, is to be added to thirty-five already past, this cause cannot be at an end till fifty-five years are elapsed after the decree.

Thus, the act of Parliament, which is adopted here to fix the time, would unfix it more, and extend it to a greater length, than it stood at by the natural jurisdiction of the Court.

This consideration alone is sufficient to show, that the enrollment, which is the work of chance, cannot be the time from whence the twenty years are to be computed.

But to make the matter more clear, I will prove,

First, That the time must be reckoned from the pronouncing the decree.

Second, If the enrollment can be material in the consideration of this question, it must relate back to that time, and there can be no averment against it.

First, what is the true reason why suits and remedies are barred by length of time?

Because the party has acquiesced, or neglected to pursue his remedy.

And the public peace requiring an end of suits, he abandons this right by submission, or forfeits it by neglect.

From what time does this neglect or submission begin to run?

From the time the party is aggrieved.

When aggrieved? When the decree pronounced, from which time he is bound.

Then it is that his right to reverse commences.

At law, the writ of error takes place from the day of the judgment; and the party goes from court to court, till he arrives at Parliament.

In this Court, besides his appeal to Parliament, he has two other ways of reversing; by rehearing, or bill of review.

But as the act of Parliament gives but twenty years to all the writs of error, this Court, by analogy, will give no more to the remedies of that nature here.

And although it is absurd to suppose, that any man would enrol for the sake of a bill of

decree. *This is a different case from a bill of review brought on [*641] new evidence; I confine myself to bills of review, for error apparent." And *then said, "that twenty years was the proper period." [*642] There are several cases where the Court has thought twenty years the *proper period, as in cases of trust, for though a trust [*643] continues forever, and is a continuation of the same estate, yet where fraud intervenes, it becomes an adverse possession. The statute of limitations may be pleaded in the case of a fraud, unless stated not to be discovered within six years, *South Sea Company* against *Wymondsell*, 3 Wms. 143. Fraud is a matter of fact, and there is just as great danger of evi-

review, when he has a much more extensive remedy upon the merits of his case, by rehearing or appeal; yet he may, if he pleases, enrol immediately after the decree.

Look into all the statutes of limitation, you will find the time begins to run from the time the title accrues, or the party is aggrieved.

In ejectment, it runs from the time when the possession is withheld; the same in all real actions: in personal, from the time the debt or demand arises, and is not paid or satisfied.

To bring the case before us under the stat. W. 3,

It must run from the time of the fine levied, or the recovery suffered; and the title accrued; because from thence the wrong commences.

In the case of a judgment,

From the signing, or from the entering on record.

That is, from the day of the judgment: for it is to be understood that, although the statute of frauds requires the judgment to be dated when it is signed, that is only necessary to bind the land against purchasers.

But if a judgment is signed at this day without a date, or with one, it still relates to the first day of term, and is a complete judgment from that time. *Salk.* 401. *Duke of Norfolk's* case.

And as that possibly might be the case, though it hardly ever happens, the act is correct in dating the commencement of the limitation from the day it would relate to, in every other case, where a purchaser was not concerned.

This Court, therefore, from the reason of the thing, as well as from the example of all the statutes of limitation, and more particularly the stat. of Wil. 3, which is in the very point, will begin to reckon from the day when the decree was pronounced.

From that time the laches commence; and when the statute time is elapsed, the door is shut forever.

But if the enrollment could be material in this question, the determination must be the same, because the enrollment must be carried back to the time of the decree, and there can be no averment against it.

What is the enrollment, but the engrossing the decree in parchment? An act that cannot possibly vary the rights of the parties. It is the very speech of the Court at the time, and is always in the present tense.

As it is impossible either to enter or enrol the decree in form, immediately after it is pronounced, the course of business makes it necessary to give some time to make up the record, which is six months; and the courts of law do the same thing, for there the roll is to be brought in the next term after the judgment.

This is hardly ever done; but although it is omitted, the party does not lose the benefit of his judgment, but upon paying the post term-fee may bring in his roll at any time; and when the record is once made up, it relates to the first day of the term, when judgment was given, and this is done without motion.

How is it here? Exactly the same in effect, for though you must obtain an order to enrol here after the time past, yet the order is of course and without notice, nor can anything ever stay the enrollment, but a caveat, in order to rehear the cause.

If that is not done, the enrollment will proceed, and it is impossible to show cause against the order, or to discharge it.

The order is always *nunc pro tunc*, what does that mean?

That it shall be the same thing as if it had been done in due time, to all intents and purposes.

And by the course of the Court you obtain the like order for entering the decree.

And to show how very immaterial the enrollment is to any real purpose, the parties have a right, not only to carry the decree into execution, but to appeal to the House of Lords, without it; and that is the constant practice, and is indeed proved by the Lords' order to appeal within fifteen days after decree pronounced, if pronounced during the sessions.

When the enrollment then takes place *nunc pro tunc*, it must relate to the time of the decree, and the record ought no more to be contradicted here than at law. For if you could in this instance aver against the record, the order *nunc pro tunc* is a nullity.

How far the House of Lords will adopt this reasoning, when the question comes before them upon the bar, is not for me to determine: but I will venture to declare that I will not consent to rehear a cause which has slept twenty years from the time of the decree.

The petition must be dismissed.

dence being lost in that as in other cases of fact. So in the case of redemption of a mortgage, twenty years is considered as a bar to redemption, even though fraud is charged, *Winchcombe v. Hall*, 1 Ch. Rep. 40. Here the inconvenience of entertaining the suit is manifest on the face of the bill; the death of Browne produces an inconvenience; had he been alive, he might have stated many circumstances the present defendants cannot; another inconvenience from the length of time is, that Browne, resting on the property as his own, has looked to it in the distribution of his other property among his children; so that great injustice would be done to the son, if this was taken out of the share allotted to him. It has been made the subject of a marriage settlement, by the present Mr.

Browne, who has lived twelve years on the presumption of its being [*644] his property. On the face of the bill, the acquiescence of the *plaintiff is as much a fraud as any he imputes to Browne. In the case of Lord *Warrington v. Booth*, as cited 3 P. Wms. 144, Lord Warrington's decree went on his showing the fraud to be within six years. In *Cook v. Arnham*, 3 P. Wms. 283, though the length of time which would not bar an ejectment was held not to bar a bill in equity, it appears by Mr. Peere Williams's note on the case, that twenty years was considered as a length of time to bar a redemption of a mortgage; and Lord Kenyon, in a case before him, was of opinion, upon a demurrer to a bill to redeem after twenty years, that it ought to be allowed, *Beckford v. Close*. (4) If any limitation is necessary, that which has been admitted is a fair one, and may be permitted to prevail.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Richards*, for the plaintiff.

The demurrer is principally founded on the length of time that has passed since the transaction: but length of time has never been admitted as an answer to a demand founded in fraud, or breach of trust; and a grosser fraud than the present never was stated to a court of justice. In *Maxims in Equity*, the case 1 Ch. Rep. 40, is cited: it says that the Court declared, that they would not relieve after twenty years, and two purchases; if they would not have relieved after twenty years only had passed, there was no occasion to mention the two purchases. In *Forrester*, 63, Lord Talbot says, no length of time will bar a fraud. So in *Bicknel v. Gough*, 3 Atkyns, 558, the stat. of limitations cannot be pleaded where fraud is charged. If it were at law, the defendant could not plead the stat. of limitations, *Bree v. Holbeck*, Douglas, 655. Here the Solicitor-General admits, if it was a recent case, the plaintiff might have relief; but the answer to his not coming sooner for relief is, that the plaintiff has been always under a pressure of distress, arising from the imposition of the defendants, which is a strong argument against any objection arising from the length of time; to maintain their argument on the subject, the counsel on the other side should find some rule that the Court will not relieve after twenty years. It is true, that, with respect to letting the mortgagor in to redeem, they have fixed twenty years as the period: but there is no case of fraud or breach of trust where the same period has been fixed; *Smith v. Clay* only goes to the practice in the case of a bill of review.

[*645] * Mr. *Solicitor-General*, in reply.

Length of time, accompanied by circumstances like the present, constitutes a bar; and if the Court ought to dismiss the bill on a hearing upon that ground, they ought to allow the demurrer. Length of time will

operate as a reason, at the hearing, for dismissing the bill, though that length of time is indefinite, and in the breast of the Court; as there are cases in which twenty years would be too long, and others, where one hundred would be too short. Length of time, of itself, will amount to a confirmation. In *Chesterfield v. Janssen*, 2 Vesey, 125, it was considered as proving, either that the first transaction was not fraudulent, or that the party had confirmed it with his eyes open. There is a great difference between cases of fraud and cases of breach of trust; and between fraud discovered and fraud undiscovered. In the present case, if there was any fraud, the plaintiff knew it as well in 1764 as he does now: he then knew what bill to file, and that he stood in the light of a mortgagor, and might come to redeem. The reason why the statute of limitations does not apply to cases of fraud is, that fraud is a secret thing, 2 Atk. 561; but if a fraud has been discovered six years, then the statute of limitation will run, Dougl. 655. As to the case of *Bicknell v. Gough*, it was a plea to the discovery and relief, without confessing the truth of the bill. The Court seems to have adopted the rule, by analogy to the practice of courts of law. What was the determination on the subject of a bill of review? Certainly upon the interest of the public *ut sit finis litium*. It is a time fixed by policy. If they had stated this transaction as being recent, we should have pleaded that they knew it twenty-seven years ago.

LORD CHANCELLOR. (5) The bill states a fraud in the years 1760 and 1764, by misrepresentation as to the value of the estate; and the plaintiff states himself as having been deceived: I am desired, by the defendant, to gather, from the circumstances of the case, and from the length of time, that the plaintiff acted with his eyes open, and that he confirmed the transaction at some period since 1764, but it does not appear when he was undeceived: this puts it out of the common cases; and the only question is, upon the *dicta*, that length of time cannot be taken advantage of upon a plea or demurrer. It might as well be *taken [*646] advantage of by a plea of the statute of limitations as any other way.

Demurrer overruled. (a)

The next day, Lord Chancellor explained the ground on which he had disallowed the demurrer in this case, by saying, that length of time,

(5) Lord Redesdale observed, 2 Scho. & Lefroy, 638 (stated *antea*, note (1)), that this report of Lord Thurlow's first judgment is hardly intelligible. See the explanation of it in notes (1) and (6).

(a) In reference to the operation of the statute of limitations, or lapse of time in cases of discovered fraud, mistake &c., see 2 Story, Eq. Jur. ch. 43, § 1521, 1521 a, and notes and cases cited; *Brooksbank v. Smith*, 2 Younge & Coll. 68; *Shelby v. Shelby*, Cooke, 183; *Pugh v. Bell*, 1 J. J. Marsh. 401; *Crane v. Prather*, 4 ib. 77; *Croft v. Arthur*, 3 Desaus. 223; *Wamburzee v. Kennedy*, 4 Desaus. 474; *Hadix v. Davison*, 3 Monro. 40; *Cole v. M'Glarthy*, 9 Greenl. 131; *Shield v. Ander-on*, 3 Leigh, 729; *Eigleburger v. Kibler*, 1 Hill, Ch. 121; *Haywood v. Marsh*, 6 Yerger, 60. The above citations show that, in cases of fraud, the statute of limitations begins to run from the time of the discovery of the fraud. See also, to same point, *Homer v. Fish*, 1 Pick. 433; *Welles v. Fish*, 3 Pick. 74, 76 (2d edit.), and numerous cases in note (1): *Jones v. Conoway*, 4 Yeates, 109; *Sherwood v. Sutton*, 5 Mason, 143; *Harrell v. Kelly*, 2 M'Cord, 426; *Bishop v. Little*, 3 Greenl. 405; *Hamilton v. Sheppard*, 2 Murph. 115; *Morton v. Chandler*, 8 Greenl. 9; *Payne v. Hathaway*, 3 Vermt. 212; *Pen-nock v. Freeman*, 1 Watts, 401; *Bertine v. Varian*, 1 Edw. Ch. 342; *Hunter v. Sposwood*, 1 Wash. 146; *Whalley v. Whalley*, 1 Meriv. 436; notes to *Alden v. Gregory*, 2 Eden, 285; *Pickering v. Stamford*, 4 Bro. C. C. 214; *Lytton v. Lytton*, 4 Bro. C. C. 441. But a bar created by the statute of limitations is not avoided by mere constructive fraud. *Farnam v. Brooks*, 9 Pick. 212.

proprio jure, was no reason for a demurrer; (6) that it was only a conclusion from facts, showing acquiescence, and was not matter of law: that he could not allow a party to avail himself of an inference from facts on a demurrer. (b) He desired it might be attended to, that this would not affect the weight of such circumstances at the hearing. (7)

(6) This part seems undoubtedly misrepresented and clearly wrong. See note (1) *ante*, and note (7) below.

(7) See the conclusion of note (1), *ante*; from whence it appears the cause never came on again; Lord D. being advised the length of time was a bar.

[The authorities are much at variance, as to whether a defence founded on the presumption raised by length of time, may be taken advantage of by demurrer. Lord Hardwicke, in *Aggas v. Pickereil*, cit. sup. and *Gregor v. Molesworth*, 2 Ves. 109, Lord Thurlow, in the present case, and Lord Rosslyn, in *Edsell v. Buchanan* (as stated in a note, 3 P. W. 287, though it does not appear from the report of that case, post, vol. iv. 254, or 2 Ves. jun. 83), appear to have been of opinion, that it could not. On the other hand, are the authorities of *Frazer v. Moor*, Bunb. 54; *Jenner v. Tracy*, 3 P. W. 297, n., and particularly the case of *Beckford v. Close*, at the Cockpit (cit. sup. and 4 Ves. 476, 19 Ves. 184, and Mitf. Pl. 174, n. nom.; *Tobin v. Beckford*), where Lord Kenyon, upon great consideration, and after a review of all the authorities, decided that a demurrer to a bill for redemption is good, in which he has been followed by Sir T. Plumer, in *Hodle v. Healey*, 1 Ves. & Bea. 536. If, however, the question can, upon these conflicting opinions, be still considered open to discussion, the following note of what fell from Lord Thurlow, on the present occasion, which has been preserved by Lord Redesdale, contains reasons so conclusive and satisfactory, that it appears difficult to withhold our assent from them: "The party who demurs," said his Lordship, "admits everything well pleaded, in manner and form as pleaded; and a demurrer ought therefore, in a court of law, to bring before the Court a question of law merely; and in a court of equity, a question of law or equity merely. The demurrer, therefore, must be taken to admit the whole case of fraud made by the bill, and the argument to support it must be, not that a positive limitation of time has barred the suit, for that would be a pure question of law, but that, from long acquiescence, it should be presumed, that the fraud charged did not exist, or that it should be intended, that the plaintiff had confirmed the transaction, or had released or submitted upon such consideration as to bar himself from the general equity stated in the bill. This must be an inference of fact, and not an inference of law; and the demurrer must be overruled, because the defendant has no right to avail himself by demurrer of an inference of fact, upon matter on which a jury in a court of law would collect matter of fact to decide their verdict, if submitted to them, or a court would proceed in the same manner in equity. What limitation of time will bar a suit, where there is no positive limitation, or under what circumstances the lapse of time ought to have that effect, must depend on the facts of the particular case, and the conclusion must be an inference of fact, and not an inference of law, and therefore cannot be made on a demurrer."

But where the defence is not a presumption from long acquiescence, but a positive limitation of time, which the Court, by analogy to the statute of limitations, adopts, it may clearly be taken advantage of by demurrer, as, in *Foster v. Hodgson*, 19 Ves. 180, where the plaintiff, upon a bill for an account, stated that no demand had been made for twelve years, a demurrer upon the statute of limitations was allowed. Lord Eldon, in that case, speaking of *Beckford v. Close*, observed, that as the limitation of an ejectment does not hold in the cases of exception, infancy, &c., so according to the rule (derived from that analogy), by which courts of equity have bound themselves, it does not follow from uninterrupted possession for twenty years, that there may not be a redemption, that the analogy to the rule of law does not bind to the form of proceeding there; and therefore his Lordship considered that case as establishing that a plaintiff in equity should state upon his bill the circumstance which takes his case out of the rule as to twenty years, and if he does not do so, that a court of equity ought not, upon the supposition, that he could do so, to harass the other party; that there is less inconvenience in requiring a plaintiff to put his case of exception upon the record in the first instance, than in permitting him to go on to establish it at a great expense; and Lord Redesdale, in speaking of this case in *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633, supports this opinion.

The application of this doctrine, therefore, to the present case will be found to reconcile it with the decision of Lord Kenyon: If a plaintiff merely states a claim founded on such a distance of time as that the Court, upon the analogy it has adopted with respect to the statute of limitations, will refuse to assist, he may then be considered as having stated himself out of Court, and he may be told that if any peculiar circumstance existed in his case

(b) If the lapse of the period of limitation appears with certainty on the face of the bill, the objection may be taken by demurrer. *Hodle v. Healey*, 1 Ves. & Bea. 536; *Wisner v. Barnett*, 4 Wash. C. C. 631; *Foster v. Hodgson*, 19 Ves. 180; *Hoare v. Peck*, 6 Sim. 51; *Hovenden v. Annesley*, 2 Sch. & Lef. 637; *Story*, Eq. Pl. ch. 10, § 484, ch. 14, § 751, and notes. See *Frazer v. Cramfeldt*, 3 Mynne & Craig, 499; *Tyson v. Pole*, 3 Younge & Coll. 266; *Humbert v. Rector & c. Trinity Ch.* 7 Paige, 195; *Van Hook v. Whitlock*, 7 Paige, 373; *S. C.* 24 Wend. 687; *Coster v. Murray*, 5 John. Ch. 521; *Story*, Eq. Pl. ch. 10, § 503; *Cork v. Wilcock*, 5 Madd. 328.

which would have entitled him to relief, he ought to have brought them forward on the record. But where, as in the present case, he alleges a case of fraud, this circumstance (upon the well-known doctrine of a court of equity, that no length of time can bar a fraud,) may be considered as forming such an exception to the rule adopted by the Court, in analogy to the statute, that the plaintiff shall be entitled to an answer to the case so stated. — *Eden.*]

Friday, 15th of June, the Lord CHANCELLOR sat in the morning to hear causes; he afterwards went to the House of Lords and prorogued Parliament; and from thence to a Court held at St. James's, where he resigned the Great Seal into the hands of his Majesty, who delivered the same to Sir James Eyre, Lord Chief Baron of the Exchequer, Sir William Henry Ashhurst, one of the Justices of his Majesty's Court of King's Bench, and Sir John Wilson, one of the Justices of His Majesty's Court of Common Pleas, as Lords Commissioners for the custody thereof.

A

T A B L E

OF

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BANKRUPT.

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Where a wife's estate is mortgaged for the benefit of the husband, she has a right to stand as a creditor; but this may be repelled by parol evidence, to show her intention to the contrary, (*Clinton v. Hooper.*) 201

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- W. F., the grandson, took possession of B., and afterwards of the manor, and lived several years, but did not settle B. to the uses of the deed of 1722, but suffered a recovery of it, and disposed of it by will: and did not execute the power of jointuring, but charged the term with 4000*l.* for his daughters, and executed the power of leasing for their benefit.
- The bill was to have B. conveyed to the uses of the deed of 1722, or to have the leases declared void, and the execution of the power bad; or for a compensation to the amount of the charges on the manor of H.
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Gift of a special residue, the interest to wife for life, then to the niece for life, then the principal to her children, if any; if not, to the younger children of A. if any; if not, to B.; the general residue to his wife; the nephew and niece had no children: the interest from death of the niece, to that of the nephew, falls into the residue, (*Wyndham v. Wyndham.*) 58

Agent for an administrator keeping money of the intestate's in his hands, which he had proposed to the principal to lay out in the funds, shall pay interest, (*Browne v. Southouse.*) 107
Though the gift of interest will vest a

legacy, maintenance will not, (*Pulford v. Hunter.*) 416

Not to be calculated on old bonds beyond the penalty, (*Thw v. Earl of Winterton.*) 489

S. P. (*Knight v. Maclean.*) 496

But see 489, n. (a)

Not given on arrears of an annuity in bar of dower, (*Thw v. Earl of Winterton.*) 489

Compound interest, (*Champion, Ex parte.*) 440, n. (b)

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SURVIVORSHIP.

JUDGMENT, Foreign.

Where a bill is to enforce a foreign judgment, it must show the effect of the judgment where pronounced, (*Cathcart v. Lewis.*) 516

JURISDICTION OF THE COURT.

Power of the Court to order void instruments to be given up, cancelled, &c. (*Ryan v. Mackmath.*) 15, 18, n. (a)
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K.

KIN, Next of.

Gift of residue to be divided among the next of kin, share and share alike, shall be divided among surviving brothers, nephews, and nieces (representing deceased brothers and sisters), (*Phillips v. Garth.*) 64

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L.

LEASE.

Covenant, in a corporation lease, to renew upon the falling in of one life forever; there is no equity to extend

it to the case where *two* are suffered to fall in, although a compensation is offered, (*Bayley v. Corporation of Leominster.*) 529

A contract to grant a lease, with common and usual covenants, does not comprise a covenant not to assign without license, (*Henderson v. Hay.*) 632

LEGACY.

Action for, (*Cooper v. Thornton.*) 187, n. (c)

Gift of 100*l.* to the four children of A. to be equally divided, considered as four legacies, (*Molenworth v. Molenworth.*) 5

Legacy of 10,000*l.* to two sisters, to be equally divided when they shall arrive at twenty-one, is a tenancy in common; and one dying under twenty-one, her share shall go to her representative, (*Jolliffe v. East.*) 25

Testator living in Antigua, giving legacies described to be sterling, and another without that distinction, the interest to be paid to the children of J. G. and Mrs. L. for life, then the principal to the grandchildren: 1*st.* the legacy is only a legacy of current money of Antigua: 2*d.* the interest shall be 4 per cent. not Antigua interest: 3*d.* the children of J. G. and Mrs. L. shall take the whole interest for their lives, nothing going over till the death of all, (*Malcolm v. Martin.*) 50

Given to A. to be divided between himself and his family; well paid to A., (*Cooper v. Thornton.*) 96, 186

[Acquiescence of legatee to a payment made to his father, &c.; how far binding after length of time, &c. *Ibid.*]

Testator gives legacies to be raised by the means after pointed out; then directs an estate to be purchased, a sum to be paid for maintenance, and the residue of rents to be applied to raise legacies; the legacies are charges on the estate, and one of the legatees dying an infant, shall not be raised for the administrator, (*Harrison v. Naylor.*) 108

Legacy to the seventh or youngest child of A., A. had six children at testator's death, and had had another, who died soon: afterwards the plaintiff was born, who was the seventh child living, but eighth in order of birth; held, he did not bear the de-

scription; and decreed in favor of the youngest child, (*West v. Lord Pri-mate of Ireland.*) 148

Executors cannot justify paying a legacy payable at twenty-one, to the infant, or for his use, except for necessities, (*Davies v. Austen.*) 178

Gift of a residue to trustees to pay interest to four persons for life, and, after death of survivor, to divide the principal among the children: two died; the interest shall be paid to the other two, (*Armstrong v. Eldridge.*) 215

Gift of residue to certain persons, and if they should die in the lifetime of testatrix, to their legal representatives. One died, his next of kin shall take: not his executor beneficially, nor his residuary legatee, (*Bridge v. Abbot.*) 224

Gift of residue to persons related to the testator, confined to persons within the statute of distributions, (*Rayner v. Mowbray.*) 234

Of the residue, the interest to be paid to testator's sisters for life; in case any of them should die leaving issue, to transfer the principal of her share to her children at twenty-one; one of the sisters died in the life of testator, her children are entitled, (*Rheeder v. Ower.*) 240

A legacy to Lady — is void, and shall not go to the Master to be supplied by parol evidence, (*Hunt v. Hort.*) 311

Of all my clothes and linen whatsoever, only passes body, not table or bed, linen, (S. C.) *Ibid.*

To A. and B. the children of C. equally, they take *per capita*, (*Butler v. Stratton.*) 367

To the descendants of A. and B. equally: all descendants, grandchildren as well as children take *per capita*. (S. C.) *Ibid.*

Where a legacy is of the value of securities, &c. though the specification be varied, the legacy is not adeemed, (*Pulsford v. Hunter.*) 416

Legacy of a sum to be divided among children, all those born before the time of division shall take. (S. C.) *Ibid.*

Legacies and a residue given in bank stock; testator had no bank stock, but had 3 per cent. consols, which would satisfy the legacies that way, and leave a residue; taken so by consent, (*Finch v. Inglis.*) 420

Legacies charged on real estates shall

remain so charged, notwithstanding they are ordered first to be paid out of the residue of the personal estate, if the personal estate prove deficient, (*Minor v. Wicksteed.*) 627

LEGACY, *adeemed.*

Legacy given out of a debt, which is afterwards paid to testatrix, adeemed, (*Badrick v. Stevens.*) 431

LEGACY, *contingent.*

Legacy to trustees, in trust for A. till twenty-one, then to transfer to A.; but in case A. should die under twenty-one, leaving children, then to the children; and in case A. should die under twenty-one without children, then over: A. attains twenty-one, but dies in testatrix's lifetime, leaving children; determined at law that children took nothing, (*Doo v. Brabant.*) 393

LEGACY, *lapsed.*

Legacy to a female infant, with power to trustees in events to diminish it; and [supposed to be] comprised in a miscalculation of the number of legacies, given over to the wife in case of legatee's dying before becoming entitled, lapsed by the death of the legatee, though, by the words of the legacy, it would have been vested, (*Molesworth v. Molesworth.*) 5

[But this was reversed on a rehearing, *Ibid.* note]

Legacy charged on real estate, lapses if the legatee dies before the time of payment, (*Harrison v. Naylor.*) 108
See (*Martin v. Wilson.*) 324

LEGACY, *specific.*

Testator reciting, that he had about 7000*l.* navy bills, gave them to A.: he had at the time about the sum, but they were afterwards sold, and other navy and victualling bills bought: at his death he had 3400*l.* navy bills, but a large quantity of victualling bills, which are considered as the same in the market: this is a specific legacy, and only the navy bills which he had at his death can pass, (*Pitt v. Lord Camelford.*) 160

LEGACY, *vested.*

To A. for life, remainder to B. and C.;

or in case one should die, living A., then to the survivor: B. and C. both die, living A., the legacy was vested, and shall go to the survivor, (*Scurfield v. Howes.*) 90

The word *maintenance* is not equivalent to interest, for the purpose of vesting legacies, (*Pulsford v. Hunter.*) 416

To daughters, equally to be divided among them, when they arrive at twenty-four years of age, is vested immediately, and only the payment postponed, (*May v. Wood.*) 471

Gift of a residue to children not to be claimed until twenty-one, but the interest given in the mean time, is vested, (*Dodson v. Hay.*) 404

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Bill charging fraud, length of time not a ground of demurrer, (*Earl of Deloraine v. Browne.*) 633, 646, n. (a)

Bill of review may be barred by delay of twenty years. *Ib.* 639, note.

LIEN.

Bankers having securities deposited as a pledge for 1000*l.* though the depositor, at his death, is indebted in a larger sum, have no lien further than the 1000*l.*, (*Vanderzee v. Willis.*) 21

See COVENANT.

LIFE ESTATE

See REMAINDER.

LIMITATION, *conditional.*

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LOST BOND.

Suit on a lost bond, &c., see (*Atkinson v. Leonard.*) 218

LUNATIC.

Where there is a reference to the Master in a case of lunacy, he may make his report, though the lunatic be dead, (*Armstrong, Ex parte.*) 238
General observations on lunacy and lucid intervals, (*Attorney-General v. Parnter.*) 441

Lord Chancellor thought that, notwithstanding the words of the statute, the Court has authority to order timber decaying on the estate of a lunatic to be cut: but did not absolutely

decide that point; or whether the produce should be considered as real or personal estate, (*Ex parte Bromfield.*) 510

M.

MAINTENANCE.

[It was once held that] the Court will not give a maintenance, for the time previous to the Master's report, but on very particular circumstances, (*Andrews v. Partington.*) 69

[*Contrà*, however, now. Editor's notes *Ibid.*]

The Court will grant a maintenance, though there is no cause in Court (*Kent, Ex parte.*) 88

S. P. (*Salter, Ex parte.*) 500

[Once held that] no maintenance shall be allowed, where the parent is of ability to maintain his children, (*Pulsford v. Hunter.*) 416

[But *contrà* now. Vide Editor's note, *Ibid.*]

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Where parties go before a Master on a reference, he must receive interrogatories from both, though one may not have gone into proof before, (*Hough v. Williams.*) 190

In matter of lunacy, the Master may make his report, though the lunatic be dead, (*Armstrong, Ex parte.*) 238

MEMORIAL.

See ANNUITY ACT.

MONEY (payment of, into Court.)

The Court will not order a balance upon charge and discharge, to be brought in, before the Master has made his report, (*Fox v. Mackreth.*) 45

But see the same point *contrà*, (*Thompson v. Pyefinch.*) 647

Where a defendant admits money to be in his hands, it will be ordered to be paid into Court, (*Strange v. Harris.*) 365

Where money has been ordered to be paid, the motion is, that the party shall pay it by a short day, or stand committed, (*Vickery v. ———.*) 372

See INJUNCTION.

MONEY (to be laid out in land.)

Will pass by the words lands, tenements, and hereditaments whatsoever and wheresoever, (*Rashleigh v. Master.*) 99

MONEY (to arise from sale of land.)

Is considered as land; and the devisee dying in the life of testatrix, lapses, (*Hutcheson v. Hammond.*) 128

MONEY (in the funds.)

Dividends shall not be apportioned, (*Rashleigh v. Master.*) 99

MONTH.

Construction of the term, (*Windale v. Fall.*) 11, n. (3), and n. (e)

MORTGAGE.

Although non-payment of interest for twenty years, where clear and no demand, raises a presumption of payment; yet, on doubtful circumstances, and the original mortgage admitted, referred to the Master to inquire whether any interest had been paid, (*Trash v. White.*) 289, 291, n. (a)

Mortgage of a ship in the port of Dublin, and delivery of muniments, the mortgagee insured her there, and made a second mortgage; the second mortgagee took possession as soon as he was informed she was in an English port: this is a sufficient possession to take it out of the statute 21 Jac. c. 19, (*Batson, Ex parte.*) 362

Mortgages cannot pass to a charity, though included in a residue, (*Attorney-General v. Earl of Winchelsea.*) 375

Devise of an estate subject to a mortgage, is not sufficient to exonerate the personal estate, (*Astley v. Earl of Tankerville.*) 545

Of a ship without reciting the registry is void, (*Hibbert v. Rolleston.*) 571

Tenant in tail makes a mortgage, with covenant for further assurance, and becomes bankrupt, his assignees are bound by the covenant, (*Pye v. Dabuz.*) 595

Tacking, (*Lowthian v. Hasel.*) 162

See ESTATE.

MORTMAIN.

Testatrix gave the residue of her per-

sonal estate to trustees, "to cause to be erected and built a dwelling-house, to be appropriated to the use of a school-house, and directed her trustees to purchase land for that purpose:" The trustees purchased land with their own money, which they were ready to give to the charity. To a bill praying that the charity might be carried into effect; demurrer, for that the charitable legacies were void, allowed (*Attorney-General v. Nash*.) 588

MOTION.

Court will not, upon motion, make an order that will decide on the merits of the cause, (*Like v. Beresford*.) 366

N.

NAME.

Testator left a residue to the children of his sisters Estrella and Reyna; Estrella had children, Reyna had none, and had changed her name and become a nun professed; but he had a third sister Rebecca, who had children; this is not sufficient to substitute the name of Rebecca, instead of that of Reyna, (*Del Mare v. Rebello*) 446

NE EXEAT REGNO.

Not issued against the husband, on the affidavit of the wife, administratrix of her former husband, (*Sedgwick v. Watkins*.) 11

Refused at the suit of assignee of a bond, the original obligee being dead, without representatives, (*Ray v. Fenwick*.) 25

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Where plaintiff has two demands on defendant, the one liquidated, the other not, the writ shall be marked

for the former only, (*Parker v. Appleton*.) 427

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NEXT OF KIN.

Testator ordered real estate to be sold, and the residue to be laid out in the funds, to remain for ten years, and at the end thereof, gave the same to his next of kin: those, who were so at his death, shall take, (*Spink v. Lewis*.) 355

See LEGACY.

O.

OFFICE.

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P.

PARTIES.

The original obligee on a bond being dead, without representative, there is a want of parties, (*Ray v. Fenwick*.) 25

An insolvent debtor is not a necessary party, to a bill by a purchaser of his interest in stock against the assignee, (*Collett v. Wollaston*.) 228

Bill for a moiety of a residue, the other moiety was given to A. for life, and upon her decease, to such persons as she should appoint; in default of appointment, to other persons: those persons must be parties, (*Sherritt v. Birch*.) 229

A person made defendant, who is only a witness, must, if he answers, answer fully, though he might have pleaded it, (*Cartwright v. Hatley*.) 238

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Of stock jobbing act, to a bill for discovery of stock transactions, overruled, (*Bancroft v. Wentworth.*) 11
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Charged on a reversionary fund, shall not, in general, be raised till the person comes into possession; yet, where it is expressly directed under a power that they shall be raised as soon as may be, they shall bear interest from the death of the testator, (*Conway v. Conway.*) 267

POWER.

A person having a power by marriage-articles, to charge an estate of which he was tenant for life, with intermediate remainder, with a contingent fee to himself, executes the power by will; the contingent fee afterwards comes to him: though, by the accession of the fee, the power is gone; yet the provision made by the will shall be served out of his estate in fee, (*Cross v. Hudson.*) 30
Power to divide a fund among all and every the children, to be vested at twenty-one, and in default of, or part execution, the whole, or the part unappointed, to go to all: there were two children, a son and a daughter; a partial provision is made for the son, who died (having attained twenty-one) unmarried, and without issue. A subsequent appointment of the whole residue to the daughter is a good execution of the power, (*Boyle v. Bishop of Peterborough.*) 243
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ADDENDUM.

To Bennet Coll. v. Carey, ante. p. 390, add the following note. "It appears from Reg. Lib. as to the subsequent proceedings, that the Master reported the defendants could make a good title. The agreement was therefore effectuated. — Reg. Lib. 1792. A. fol. 509."

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